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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

AHMED A. OPETUBO, Pro Se
PETITIONER

vs.

CITIBANK STUDENT LOAN CORPORATION; UNITED STUDENT AID FUNDS, INC., AND EDUCATIONAL CREDIT MANAGEMENT CORPORATION
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

United States Code Title 11, § 523 (a)(8) provides that student loans may not be discharged in bankruptcy unless non-discharge will impose an undue hardship on the debtor and debtor's dependents.

1. Does the creditor's initial burden and standard of proof to show by a preponderance of evidence, switch at any point to the debtor, requiring him to show proof of the correct balance due on the loan?

2. In construing the statutory term "undue hardship," should the court limit its review to certain evidence and/or ignore other evidence pertaining to the debtor's current financial, economical and social status?

3. Can the debtor's ability to repay a student loan be determined without factual findings of the amount that is minimally necessary for the debtor's care including food, shelter, clothing and medical treatment are met?

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OPINIONS BELOW

The opinion of the United States court of appeals appears at **Appendix A, page 1a,** to the petition is unpublished.

The opinion of the United States district court appears at **Appendix B, page 4a,** to the petition is unpublished.

The opinion of the United States bankruptcy court appears at **Appendix D, page 14a,** to the petition is unpublished

JURISDICTION

The opinion of the United States court of appeals in this was filed on September 11 2003. A timely for Rehearing En Blanc was filed on October 16 2003. The Court of Appeals denial on the merit of the Petition for Rehearing En Blanc was issued on November 18, 2003 and is set forth in **Appendix C page 12a**. The jurisdiction of this Court is invoked under Title 28, U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

Title 11 U.S.C. §523(a)(8), which provides as follows:

> (a) A discharge under Section 747, 1141, 1228(a), 1228(b) or 1328(b) of this title does not discharge an individual debtor from any debt- ...
>
> (8) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents.

STATEMENT OF THE CASE

The United States Bankruptcy Court, Eastern District of New York, had jurisdiction pursuant to Title 28, U.S.C. §157(b) (2) I.

1. Background. I took out student loans in order to finance my graduate education at the New School for Social Research in New York City from 1982 to 1985 and the Long Island University in Brooklyn, NY from 1987 to 1991.

The two loans were consolidated in July 1992. I was employed as an Auditor with New York City Government at the time of filling bankruptcy. My financial conditions changed drastically in March 1997 when a Bi-weekly garnishment of $825 for Child Support Order based on a Divorce case started in July 1996 in the Bronx County Supreme Court was effective. I was laid off at time of filling appeal in January 2004 and collected unemployment. The unemployment benefits has run out and I have been, to the extent possible, deriving income from driving a livery cab on a part-time basis, while still actively searching for employment in my professional field.

2. Commencement of Litigation. I filed a voluntary petition for liquidation of my debts under chapter 7 of Title 11 United States code on June 2, 2000 in the Bankruptcy Court. On December 6, 2000, I commenced an adversary proceeding in the Bankruptcy Court to determine the dischargeability of my student loan obligations under the terms of 11 U.S.C. §523(a)(8) of the Bankruptcy Code on grounds of undue hardship.

3. Loans Balance. The two loans were consolidated in July 1992 for a total amount of $29,770.59. I made at least a total of 46 payments, averaging $267.86 each, totaling $12,321.56 up to July 1997. These payments were not reflected by the defendant in arriving at the amount of $46, 123.83 claimed to be the balance owed on the consolidated loan. In fact, the USF groups/Citibank record dated September 3, 1998 showed that a total of $29,770.59

was disbursed and total payments and refund received was $17,348.48 as stated in Appendix E. According to information contain in the USF groups/Citibank record, the accurate and correct balance on the loan is $12,462.11 ($29,770.59 less $17,348.48).

4. Trials and Judgment. The Bankruptcy Court held a bench trial on October 16, 2001 and issued a decision on February 4, 2002 denying the discharge of the loan pursuant to 11 U.S.C. § 523(a)(8). The Bankruptcy Court's Notice of trial instructed me to submit a joint brief by both parties. The joint brief submitted was not sign by me and I was not privy to the complete information in the brief. I made my objection known to the court. I had never before represents myself at a trial except in the traffic court. The court gave no indication that it would not follow its stated procedure.

5. District Court Appeal. On February 14, 2002, I filed a notice of appeal to the United States District Court. On July 23, 2002, the District Court issued a final order and judgment and an opinion affirming the Bankruptcy Court decision.

6. Second Circuit Appeal. On March 28, 2002, I filed a notice of appeal with the Second Circuit court of Appeals. On September 11, 2003, the Second circuit issued an Opinion affirming the District Court decision.

7. Second circuit Conclusions on Undue Hardship. The Second Circuit held that the debtor bore the burden of demonstrating undue hardship under the Second Circuit Court's three-part test in Brunner v. New York State Higher Educ. Servs. Corp., 831 F.2d 395, 396(2d. Cir 1997).

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for the following reasons: First, the Opinion of the Court pertaining to the balance due on the loan contrary to the evidence submitted. Second, the Opinion of the Court excluded certain evidence on determining "undue hardship". Third, the Opinion of the Court on the ability of the debtor's to repay the student loan was without factual findings of the amount that is minimally necessary for the debtor's care including food, shelter, clothing and medical treatment.

I. BALANCE DUE ON THE LOAN.

It is undisputed that the loan involved in the adversary proceeding is an educational loan of the type described in §523(a)(8) of the Bankruptcy Code. Hence, the only issue presented is whether it will impose an "undue hardship" on me if the loan is not discharge. I primarily financed my education at the New School for Social Research in New York City from 1982 to 1985 and the Long Island University in Brooklyn, NY from 1987 to 1991 through student loans.

The two loans were consolidated in July 1992 and the first monthly payment on the consolidated loan was on December 18, 1992 in the amount of $29,770.59 as shown in the USF groups/Citibank record, **Appendix E page 24a**. In fact, I had made at least 46 payments averaging $267.86 each totaling $12,321.56 from December 1992 through June 1997 on the defaulted consolidated loan. I continued to make monthly payment on the loan from August 1992 without any deferments or interruption until July 1997 before a bi-weekly garnishment of $825 for Child Support Order based on pending Divorce case started in July 1996 at the Bronx County Supreme Court, **Appendix F page 25a**.

The U.S. Court of Appeals concluded that.... several of the exhibits concerning the correct balance due on the loan were not submitted to the bankruptcy or district courts, and therefore, would

not clarify this Court's "understanding of the process by which the District Judge reached the decision challenged on appeal."

The two loans were consolidated in July 1992 for a total amount of $29,770.59. In fact, the USF groups/Citibank record dated September 3, 1998, confirmed that the amount consolidated was $29,770.59 of which they received payments totaling $17,348.48. Based on the USF groups/Citibank record dated September 3, 1998, the outstanding balance on the consolidated loan should be $12,422.11 ($29,770.59 minus $17,348.48). This document was presented to the Appeal Court as appellant's exhibit 3 (DC – 31); to the District Court as exhibit 31 and to the Bankruptcy Court as exhibit 4 as indicated in **Appendix E page 24a**.

I made the first payment of $296.88 on the consolidated loans and had made at least a total of 46 payments, averaging $267.86 each, totaling $12,321.56 up to July 1997. The proof was presented to the U.S. Court of Appeals as appellant's exhibit 3 (DC – 27); to the District Court as exhibit 27 and to the Bankruptcy Court as exhibit 4 as shown in Appendix F of this petition.

In addition, my disagreement was explicitly stated on page 6, paragraph 1 of the Plaintiff's Post Trial Statements submitted to the Bankruptcy Court on November 05, 2001, which was presented to the Appeal Court as exhibit 3(DC-10) and as exhibit 10 to the District Court. In addition, I made it known to the District Court on Paragraph 47, page 24 of the Appellant's Brief filed on March 28, 2002 as well, which was presented to the Appeal Court as exhibit 3. Finally, this was made known to the Appeal Court on pages 12, 17 and 18 of the "Brief of Appellant" filed on February 11, 2003. Also, it was restated on page 5, paragraph 1 of the Reply Brief of Appellant filed on June 11, 2003, **Appendix G page 26a.**

The respondent use a different amount as the basis for arriving at the $46,123.83 claimed to be the balance owed, **Appendix H page 32a**. The Respondent did not account for $12,321.56 payments I had made on the consolidated loan as shown in Appendix F page 25a of this petition. The Respondent willfully and deliberately ignored the true and correct balance of $12,422.11 ($29770.59 minus $17,340.48) as computed from the USF

groups/Citibank record as shown in **Appendix E, page 24a**. I believe that the respondent engaged in an unethical practice for not accounting for the amount I had paid on the loan as shown in the USF groups/Citibank record.

The U.S. Court of Appeals chose to ignore all these documents evidencing payments that I made on the loan and my disagreement with the amount, which the Respondent claimed as the balance due on the loan.

II. ADDITIONAL EVIDENCE SUBMITTED ON APPEAL.

The U.S. Court of Appeals stated in the summary order.... this Court will not consider the additional evidence Opetubo submitted on the appeal because the majority of the documents reflect changes in Opetubo financial circumstances after the bankruptcy and district court decisions.

All of these documents and information of the additional evidence the were not available during the Bankruptcy adversary proceeding trial in October 16, 2001 or to the District court in May 2002 when I submitted my Appellant's brief. The events occurred after the District Court had issued its "Opinion and Order" affirming the Bankruptcy Court decision in June 2002. Therefore, the documents and information could not satisfy the requirements under Fed. R. App. P. 10(e) (1) and (2).

These records are not testimony or an affidavit from a third party attesting to my current financial conditions and standard of living. The evidence in question has a direct impact on my life and my dependent welfare. The documents and information were included in the Appellant's brief to show the Court of the current and true picture information on my employment status, source of income, marital status, my daughter's education status and my current financial conditions and standard of living.

The documents in question are as follow:

Employment termination letter – On January 6, 2003 I received a termination letter from my employer informing me of my last day of employment, **Appendix I page 36a.**

Marriage Certificate – I cannot provide the Marriage certificate to the Bankruptcy Court because the event took place after October 16, 2001 and she is not residing in the United States of America. It is true that I reside alone because the United States Department of Justice, Immigration and Naturalization Services (INS) did not grant her a non-immigrant visa so that she can travel to the U.S.A. INS will only grant her a visa if there is a proof that we were married, as a result the marriage was necessitated by INS requirements for obtaining a visa so that she can travel to the U.S.A. to live with me. The Bankruptcy Court statement that I reside alone does not mean that I am single or married. On the contrary, the District Court did not mention that I reside alone or not, **Appendix J page 38a**.

Statement of monthly income and expenses – The revised statement was necessitated because I was laid off on January 6, 2003 and the only source of income is the unemployment compensation. As a result, my household income has changed and it is necessary for me to provide my current statement of monthly income and expenses. However, the unemployment benefit has run out and I do not have a steady source of income, except for $120 income derived from driving livery cab on a part-time basis, **Appendix K page 39a**.

COBRA health benefit – It is equally important for me to show the Court of the proof of how much the health insurance coverage will cost if I choose to have health insurance coverage. The health insurance cost will be additional expenses for me if I choose to be covered under any insurance plan. I am not covered under any health insurance coverage, **Appendix L page 41a**.

College admission letter – I was never in the possession of the document until August 2002 when I took my daughter to the college. It is impossible for me to introduce the document into evidence in the Bankruptcy Court on October 16, 2001. The college acceptance letter was even dated November 27, 2001, which

was over a month after the Bankruptcy Court adversary proceeding trial. Furthermore, the document is presented to reiterate my responsibilities regarding my payment of 50% of my children College education as stated in the sanctioned Divorce stipulated agreement and decree. The District Court stated in its Opinion and Order...."there is no evidence in the record that his children will attend college or that even if one or both do, they will not receive financial aid, scholarship, or attend public, or community college." (exhibit 4, page 7, footnotes 4 & 5 of the appellant's brief), **Appendix M page 44a**.

Loan disclosure statement – I did not know that my daughter took a non-deferment interest bearing student loan to finance her first year College education. This information was made known to me in December 2002 when she came home for the holidays and she mailed me the document in January 2003 when she got back to the College. The District Court stated in its Opinion and Order.... "There is no evidence in the record that his children will attend college or that even if one or both do, they will not receive financial aid, scholarship, or attend public, or community college." (exhibit 4, page 7, footnotes 4 & 5 of the appellant's brief). The document was presented to reiterate my responsibilities regarding my payment of 50% of my children College education as stated in the sanctioned Divorce stipulated agreement and decree, **Appendix N page 46a**.

Receipts for supplies – The document is presented in support of other expenses apart from the tuition fee as stated in the appellant's brief (page 27, paragraph 1, last sentence), **Appendix O page 47a**.

Employment vacancy notice – The e-mail dated January 7, 2003 was a response to a job vacancy notice that I applied for sometime in November 2002. As stated in the Appellant's brief, I have intensified my job search since the Mayor of New York City issued a press release on October 31, 2002 that my previous agency will be merged with other agency and will result in a reduction of 50% work force from my agency. I continued the quest for job search when I received the laid off letter on January 6, 2003. The exhibit is to show the steps that I have taken to start looking for a

job after the Mayor's press released and after been laid off, **Appendix P page 48a**.

The Court fails to recognize that each change in my situation results in certain consequence. The evidence in question depicts my current financial, social and economic conditions, which is in line with the terms of 11 U.S.C. §523(a) (8) of the Bankruptcy Code and the application of the "Brunner tests". The Brunner test consists of the following three requirements that need to be proven in order for the debt to be discharged: 1) The debtor must establish they cannot maintain, based on current income and expenses, a 'minimal' standard of living if forced to repay the loan. 2) The debtor must show that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the loans. 3) That the debtor has made good faith efforts to repay the loans. See *In re Brunner*, 831 F.2d at 396.

I believe that the Court should have considered all the evidence before them through application of common sense because the evidence shows my current financial, social and economic conditions.

III. UNDUE HARDSHIP

In many published decisions, the determination of "undue hardship" under 11 U.S.C. § 523 (a) (8) begins with a selection among various "tests" or "approaches" that different courts have used. The Bankruptcy Court adopted the "Brunner tests" in determining whether repayment of the student loans would constitute "undue hardship" on the debtor.

However, the following paragraphs provide the different methods by which various courts have followed to determined undue hardship.

a. Johnson. In Penn. Higher Educ. Assistance Agency [hereinafter PHEAA] v. Johnson (In re Johnson), 5 Bankr. Ct. Dec. (CRR) 523 (Bankr. E.D. Pa. 1979), the Court developed a three-test approach to detect undue hardship. The three tests were called the "mechanical," "good faith," and "policy" tests. Id. at 544.

b. Bryant. In Bryant v. PHEAA (In re Bryant), 72 B.R. 913, 915 (Bankr. E.D. Pa. 1987), the Court developed a two-step approach that determines whether the debtor's income was above the poverty line and then shifted the burden of proof accordingly.

c. Case-by-Case. This approach, also known as the "totality of circumstances" approach, may have received its first formation in Wegfehrt v. Ohio Student Loan Comm'n (In re Wegfehrt), 10 B.R. 826, 830 (Bankr. N.D. Ohio 1981).

d. Brunner. In Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F. 2d 395, 396 (2d Cir. 1987) the Court developed a three-part approach that shared some features with Johnson but differed by e.g., lacking a policy test.

Section 523(a) (8) was enacted to prevent the abuse of the bankruptcy system by indebted students who would file for bankruptcy upon graduation even though they had or were soon to have a career, which would ultimately enable them to repay the obligation. See. e.g., Tennessee Student Assistance Corp. v. Hornsby (In re Hornsby), 144 F.3d 433, 436-37 (6th Cir. 1998); See *In re Cheesman*, 25 F .3d at 359 (citing Andrews University v. Merchant *(In re Merchant)* 958 F. 23d 738, 739 (6th Cir. 1992)) Green v. Sallie Mae Serv. Corp. (In re Green), 238 B.R. 727, 731 (Bankr. N.D. Ohio 1999). ("the underlying policy basis for excepting student loans from a bankruptcy discharge was the perceived need to rescue the student loan program from insolvency, and to also prevent abuse of the bankruptcy system by the students who finance their higher education through the use of government backed loan...."). Notwithstanding the policy concerns underline in §523(a) (8), Congress provided for an undue hardship exception, which allows for a discharge to "some student debtors [who are] in true need of bankruptcy relief." *In re Green*, 238 B.R at 733.

Evidence of such abuse may be anecdotal; the National Bankruptcy Review commission (NBRC) states that "empirical evidence does not support the oft-cited allegation that changes in bankruptcy law entitlements exemptions, dischargeability, or

otherwise affect the rate of filing for bankruptcy to obtain those benefits." National Bankr. Rev Comm'n, Bankruptcy: The next Twenty Years § 1.4.5 (oct. 20, 1997). The NBRC was an independent commission created to prepare a report on issues in the Bankruptcy Code for submission to the President, Congress, and the Chief Justice. See Bankruptcy Reform Act of 1994, Pub. L. No. 103 – 394 § 603, 108 Stat. 4106, 4147 (codified at 11 U.S.C cmt. Preceding 101). The NBRC submitted its final report on October 20, 1997; having achieved its purpose, it ceased to exist. Notably, the NBRC recommended that § 523 (a) (8) be repealed because '[t]he bankruptcy system, through its network of exceptions to discharge, seems to penalize individuals who seek to educate and improve themselves while it liberates other individuals from overwhelming debt incurred for other purposes or through different means." Report of Nat'l Bankr. Rev. Comm'n, supra, at § 1. 4. 5. The NBRC saw an added benefit in repeal of § 523 (a) (8) (B) in that "[l]itigation over 'undue hardship' would be eliminated, so that the discharge of student loans no longer would be denied to those who need it most." Id.

It is undisputed that the loan involved in this adversary proceeding is an educational loan of the type described in §523(a) (8) of the Bankruptcy Code. Hence, the only issue presented is whether it will impose an "undue hardship" on me if the loan is not discharge. I primarily financed my education at the New School for Social Research in New York City from 1982 to 1985 and the Long Island University in Brooklyn, NY from 1987 to 1991 through student loans. My first loan was used to finance my education at the New School for Social Research in New York City from 1982 to 1985 and at the Long Island University in Brooklyn, NY from 1987 through 1990 of which I was making payments on both loans until they were consolidated in July 1992.

The two loans were consolidated in July 1992 for a total amount of $29,770.59 as indicated in **Appendix D page 14a**. I made the first payment of $296.88 on the consolidated loans and had made at least a total of 46 payments, averaging $267.86 each, totaling $12,321.56 up to July 1997 as indicated in **Appendix E**

page 24a. These payments were not reflected by the defendant in arriving at the amount of $46, 123.83 claimed to be the balance owed on the consolidated loan. In fact, the USF groups/Citibank record dated September 3, 1998 showed that a total of $29,770.59 was disbursed and total payments and refund received was $17,348.48 as stated is **Appendix D page 14a**. My financial conditions changed drastically in March 1997 when a Bi-weekly garnishment of $825 for Child Support Order based on a Divorce case started in July 1996 in the Bronx County Supreme Court was effective as shown in **Appendix F page 25a**.

In July 1997, I found myself in a financial downward spiral and see that I will continue going deeper in debt and my financial situation causes such stress that interfere with my ability to work and sleep. For the reasons, I sought a relief under Chapter 7 of the United States Bankruptcy Code on June 2, 2000, which $37,000 in unsecured debt was discharged. My seeking of Chapter 7 relief was because of my mental health rather than financial necessity.

Even though, §523(a)(8) permits student loan debts to be discharge if the debtor can prove that a repayment of such debt would create "undue hardship," Congress has failed to define those terms and has left such interpretation to the courts' discretion. See In re Hornsby, 144F.3d at 437 ("Courts universally require more than temporary financial adversity and typically stop short of utter hopelessness.") In the case of Ammirati v. Nellie Mae, Inc. (In re Ammirati), as the majority of other courts, adopted the Brunner standard in determining whether the repayment of student loans would constitute "undue hardship" on the debtor. Ammirati v. Nellie Mae, Inc. (In re Ammirati), 187 B.R. 902, 905-06 (D.S.C. 1995), aff'd 85 F.3d 615 (4th Cir. 1996); see also In re Hornsby, 144 F.3d at 144 F.3d at 437-38; Kapinos v. Graduate Loan Ctr. (In re Kapinos), 243 B.R. 271 (W.D. Va 2000); Salinas v. United Student Aid Funds, Inc. (In re Salinas), 240 B.R. 305, 314-15 (Bankr. W.D. Wis 1999); In re Green, 238 B.R. at 734; Hoyle v. Pennsylvania Higher Educ. Assistance Agency, 199 B.R. 518, 521 (Bankr. E.D. Pa. 1996); Caulder v. Educational Credit Management Corp. (In re Caulder), C/A No. 98-06808-W; Adv. Pro. No. 98-80273-W (Bankr.

D.S.C. 04/06/1999); Carlson v. UNIPAC Student Loan (In re Carlson), Case No. 00-07519/W; Adv. Comp. No. 00-80255/W (Bankr. D.S.C. 05/18/2001; In re Pena, 207 B.R. 919 (9th Cir. BAP 1997).

The 11 U.S.C. § 523 (a) (8) of the bankruptcy code provides for the discharge of the student loan debts to the extent that they constitute an "undue hardship" upon the debtor or his/her dependents. Majority of the Bankruptcy Courts has adopted the "Brunner tests" in determining whether repayment of the student loans would constitute "undue hardship" on the debtor. The Brunner standard used to determine whether a debtor's repayment of student loans would constitute an undue hardship under §523(a) (8) consists of the following three requirements that need to be proven in order for the debt to be discharged:

1. The debtor must establish they cannot maintain, based on current income and expenses, a 'minimal' standard of living if forced to repay the loan.
2. The debtor must show that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the loans.
3. That the debtor has made good faith efforts to repay the loans.

A. *Brunner's* First Prong: "Minimal Standard of Living"

In determining whether the first requirement under the Brunner test is satisfied, some courts have equated poverty with "minimal" standard of living. *See, e.g., In re Griffin,* 197 B.R. 144, 147 (Bankr. E.D. Okla. 1996). However, many other jurisdictions do not require the debtor to live in poverty to satisfy the first prong; rather those courts take into consideration the debtor's current income and expenses in determining whether the debtor and his or her dependents, if any, will be able to sustain a "minimal" standard of living. *See Ammirati v. Nellie Mae, Inc. (In re Ammirati),* 187 B.R. 902, 905-06 (D.S.C. 1995), aff'd 85 F.3d 615 (4th Cir. 1996); *In re Pena, 207 B.R. 919 (9th Cir. BAP 1997); see also Salinas v. United Student Aid Funds, Inc. (In re Salinas),* 240 B.R. 305, 314-15

(Bankr. W.D. Wis 1999) ("The bankruptcy court must determine what amount is minimally necessary to ensure that the debtor's needs for care, including food, shelter, clothing and medical treatment are met. ... Once that determination is made, the question is whether the debtor has any additional funds with which to make payments toward his or her student loan obligations."); *Hoyle v. Pennsylvania Higher Educ. Assistance Agency*, 199 B.R. 518, 523 (Bankr. E.D. Pa. 1996) ("We do not believe...that Congress intended a fresh start under the Bankruptcy Code to mean that families must live at poverty level in order to repay educational loans.") *In re Correll* 105 B.R. 302, 306 (Bankr. W.D. Pa. 1989) (Where a family earns a modest income and the family budget, which shows no unnecessary or frivolous expenditures, is still unbalance, a hardship exists from which a debtor may be discharged of his student loan obligations).

My previous net monthly income when I was employed was $3,218.00, while my monthly expenses were in the amount of $4,148 leaving me with a deficit of at least $930.00 per month as stated in the record provided to both the District Court and the Bankruptcy Court, **Appendix Q page 49a**.

I was laid off on January 6, 2003 as indicated in Appendix M, page 44a of this petition, during my appeal to the U.S. Courts of Appeal and I collected unemployment benefits at the rate of $364.50 per week beginning in February 2003 for 39 weeks. Based on the unemployment benefits I submitted a revised monthly income and expenses schedule. My monthly income was $1,579.50 and expenses are in the amount of $2,577 leaving me with a deficit of $997 per month as shown in **Appendix K page 39a**. My monthly expenses in this schedule did not include my child support obligations, summer camp expenses, life insurance and medical.

Currently, I am unemployed since January, 2003, the unemployment benefits has run out and I do not have any steady source of income except for $120 derived from driving livery cab on a part-time basis. I do not have any health insurance coverage. I have to be withdrawing from my deferred compensation, which will be completely depleted in the nearest future if I do not get a job

soon. In addition, I am not qualified to receive any pension because I was not vested before my employment was terminated. I cannot withdraw the contribution I made into the plan until I reached retirement age. My daughter has to take twice the amount of a non-deferred interest bearing student loan she took in academic year of 2002/2003 ($3000) to pay for her college tuition this academic year 2003/2004 ($6,000).

I have not paid any child support since I was laid off. I appeared at the Bronx County Supreme Court on January 13, 2003 and waiting for court decision on how much I owed and what amount I should be paying based on my current financial status, **Appendix R page 51a**.

The simple fact is that §523(a) (8) does not mandate that the debtors fall below governmental poverty guidelines before their debts can be discharged. As the court stated in *Pennsylvania Higher Educ. Assistance Agency v. Faish (In re Faish)*, 72 F .3d 298, 305 (3rd Cir. 1995), the code does not require that the debtor "live in abject poverty ...before a student loan may be discharged." The court's obligation is to determine the amount "minimally necessary" to ensure the debtor's needs for care, including food, shelter, clothing, and medical treatment are met. *Rice v. United States (In re Rice)*, 78 F .3d 1144, 1149 (6th Cir. 1996). In this regard, the Court is bound by Seventh Circuit's decision in *Matter of Roberson*, 999 F .2d 1132 (7th Cir. 1993), a decision which like *Faish* adopted the so-called " *Brunner* test" to determine the dischargeability of student loan debt. As the *Faish* court recognized, the *Roberson* decision did not require showing of economic futility by the debtor. Rather it focused on the debtor's ability to pay the debts. This is reflected in the fact that a minimal standard of living requires "more than a showing of tight finances." *Stein v. Bank of New England, N.A. (In re Stein)*, 218 B. R. 281, 287 (Bankr. D. Conn. 1998). If the debtor has done everything he can to minimize expenses and maximize income, there is no basis for refusing to discharge the student loans. *Ammirati v. Nellie Mae, Inc. (In re Ammirati)*, 187 B.R. 902, 907 (D.S.C. 1995). In the end, what the court must do is to examine the debtor's current income and expenses and determine a "flexible

minimal standard of living" which is sensitive to the particular circumstances of each case through the application of common sense. *Stein*, 218 B.R. at 287.

My financial conditions changed drastically in March 1997 when a Bi-weekly garnishment of $825 for Child Support Order based on a Divorce case started in July 1996 in the Bronx County Supreme Court was effective. The copy of the March 1997 Bi-weekly was presented as exhibit 13 in the Post Trial Statement as indicated in **Appendix U page 70a**. In July 1997, I found myself in a financial downward spiral and see that I will continue going deeper in debt. Therefore, I sought a relief under Chapter 7 of the United States Bankruptcy Code, and commenced an adversary proceeding seeking a determination to discharge my student loans under §523 (a) (8). Since that time till present, I have to be borrowing money from my pension, friends and use credit cards to augment my income and trying to make ends meet, **Appendix S page 54a**.

The Court considered my upsides prospects for the future and did not allow for a downside risk of unemployment. The Court offer a subjective and seemingly arbitrary critique of the amounts I should spend for food, medical expenses, transportation, basic telephone services, recreation, children summer camp expenses, child support obligations and whether I should be contributing to a retirement plan because my income is above the poverty level. The bankruptcy Court did not grant me the request I had made during cross-examination to elaborate on the expenses listed in my income and expenses schedule, **Appendix T page 58a**.

My contribution to the retirement plan when I was employed was the only asset I have and is a reasonable investment considering my age and lack of any other assets. *McCormack v. Educational Credit Management Corp. (In re McCormack)*, C/A No. 99-10637-W; Adv. Pro. No. 99-80401-W (Bankr. D.S.C. 07/06/2000). In re *McCormack*, She testified that her current monthly income would decrease when her contributions to health insurance and pension plan become effective. The Court finds that ...when comparing her monthly income, once the health insurance and contribution to

retirement are deducted from her pay, it becomes clear that Plaintiff would not be able to maintain a "minimal" standard of living if she were forced to fully repay her student loans. In re *McCormack*, the Court did not consider her contribution to the pension plan as part of her net pay and thereby considered it as necessary and reasonable deductions from her gross income. Currently, the contribution I made into the plan is almost depleted because I have to be withdrawing from it to support my dependants and myself.

B. *Brunner's* Second Prong: "Additional Circumstances Exist"

The second *Brunner* factor requires a showing by the debtor that additional circumstances exists which would cause the financial affairs of the debtor to persist during the term of the repayment period, or a significant part of it. "It is this prong of the Brunner test which ensures that the financial hardship the debtor is experiencing is actually undue." *Green v. Sallie Mae Servicing Corp. (In re Green)*, 238 B.R. 727, 734-34 (Bankr. N.D. Ohio 1999); *Carlson v. UNIPAC Student Loan (In re Carlson)*, Case No. 00-07519/W; Adv. Comp. No. 00-80255/W (Bankr. D.S.C. 05/18/2001; *McCormack v. Educational Credit Management Corp. (In re McCormack)*, C/A No. 99-10637-W; Adv. Pro. No. 99-80401-W (Bankr. D.S.C. 07/06/2000); *Caulder v. Educational Credit Management Corp. (In re Caulder)*, C/A No. 98-06808-W; Adv. Pro. No. 98-80273-W (Bankr. D.S.C. 04/06/1999); *Salinas v. United Student Aid Funds, Inc. (In re Salinas)*, 240 B.R. 305, 314-15 (Bankr. W.D. Wis 1999).

I believe that the Bankruptcy Court's obligation is to ascertain the debtor's likely future prospects, *In re Doherty*, 219 B.R. at 671. My current financial situation, while not is not encouraging, would not increase in the nearest future than at present. Also, there are no indications that any of my current expenses could be eliminated or defrayed for the foreseeable future.

The District Court and the Bankruptcy Court engaged in predicting and speculating my future disposable income. The District Court stated that ...his responsibility for approximately $1,500 per month in child support, and obligation that will persist, under his divorce

agreement, until his children reach the age of twenty-one. (It is somewhat unclear in the record whether this obligation will terminate when his children reach eighteen, should they choose not to attend college. The court assumes arguendo that this obligation will extend to the age of twenty-one regardless of children's college attendance.) As his children are seventeen and thirteen, half of this obligation will expire in approximately four years, and the other portion will expire in eight years. Additionally, it is difficult to imagine that appellant's teenage children will continue attending -- if in fact they continue to attend -- summer camp such that he will have $250 more available to him every month in the very near future.

The District Court stated that it is somewhat unclear in the record whether my support obligation will terminate when the children reach age of eighteen years. Similarly, the Bankruptcy Court provides its own interpretation of when the support obligations end. Both courts willfully ignored the Bronx County Supreme Court definition of emancipation age of the children, which is 21 years, as stated in the sanctioned Divorce stipulated agreement and decree, **Appendix U page 70a**. Further, the District Court continued ... there is no evidence in the record that his children will attend college or that, even if one or both do, they will not receive financial aid, scholarships, or attend public or community colleges.

In fact, my older daughter started college in the academic year of 2003 and her tuition is $8,185. She has to take a $2,625 in student loan to supplement her tuition fees as shown in **Appendix N page 46a**. It is evidently clear that my daughter did not receive any financial aid, scholarships, or attend public school or community colleges as assumed by the District Court. My support obligations have increase <u>not</u> decrease as indicated by the District Court. In accordance with the divorce stipulated agreement (pages 6 & 7) and decree, I am responsible for 50% of their College education expenses and I have to continue paying the child support until the age of 21 of the children. Also, I have to pay my share of the children summer's activities, which I do not know what the amount will be based on my current financial situation. Part of the summer

camp expenses will continue for one of the children and other part has become part of the college expenses for my daughter who is in college. In fact, I spent a total of $1,200 for taking her to the college in August 2002 as indicated in **Appendix S page 53a**. Speculating and projecting income is a very difficult undertaking for a finder of fact. Such projections rest as much on evidence of future income prospects, which in my case is scant to nonexistent, as on common sense and experience, which are both highly subjective. However, such view to the future is virtually mandated by the statute and the *Brunner* tests in its requirement that court determine if "[the] state of affairs is likely to persist for a significant portion of the repayment period. *See In re Rivers*, 96-04212 A (Bankr. S.D. Ga Sept. 8 1997). In addition, the District Court was certain that I could somehow manufacture sufficient income to make even nominal payments by projecting my disposable income.

I have a graduate degree in Management Auditing and an MBA in Accounting. I was employed as an Audit Manager with the New York City School Construction Authority (SCA) for almost 13 years before I was laid off on January 6, 2003. The District Court believe that they know what future holds in store for me – a new and better paying job than my previous job at SCA or a promotion thereof, my health conditions is good, I have marketable skill cumulating with advance degree. Any immediate evaluation of the likelihood for positive change in my present or future financial circumstances by the District Court is speculative in nature and is not a firm basis for the Court to reach a decision.

There are several circumstances that will persist for the repayment terms of the loan estimated to be 20 years. The 20 years repayment period was based on the original consolidated Loan payment duration because the defendant did not accounted for the payments I made for five years, from December 1992 through July 1997, before defaulting on the loan. Even if the Defendant had accounted for the five years periods I had paid on the loan, the payment period that would remain on the loan will be 15 years.

I am 54 years old, unemployed; and considering my age and the remaining payment periods of the student loan, I will be either

74 years old (using 20 years payment period) or 69 years old (using 15 years payment period). I do not foresee my income to be the same as the income from my previous job nonetheless of it to increase in the nearest future and during the projected payment periods of the loan. In fact, my older daughter is in college and half of the summer expenses have become college expenses. I am now a married man with additional responsibilities. There are possibilities that I may retired sooner than I planned because the job market is very tight and my age is not in my favor.

In accordance with the divorce stipulated agreement (pages 6 & 7) and decree, I have to continue paying the child support until the age of 21 of the children. My first child will be 21 years of age in 4 years (2006) and I will be 57 years old then, if God willing. The second child will be 21 years of age in 8 years (2009) and I will be 60 years old.

Based on the above stated I believe that the second prong of the *Brunner test* is met. *Carlson v. UNIPAC Student Loan (In re Carlson),* Case No. 00-07519/W; Adv. Comp. No. 00-80255/W (Bankr. D.S.C. 05/18/2001; *Caulder v. Educational Credit Management Corp. (In re Caulder),* C/A No. 98-06808-W; Adv. Pro. No. 98-80273-W (Bankr. D.S.C. 04/06/1999); *Salinas v. United Student Aid Funds, Inc. (In re Salinas),* 240 B.R. 305, 314-15 (Bankr. W.D. Wis 1999); *In re Pena, 207 B.R. 919 (9th Cir. BAP 1997).*

C. *Brunner's* Third Prong: "Good Faith Efforts"

The final aspect of the *Brunner* test is that of "good faith." Quite simply, the debtor must have made a good faith effort to repay his loans. As the Seventh Circuit stated, "With the receipt of a government-guaranteed education, the student assumes an obligatio to make a good faith efforts to repay those loans, as measured by his or her efforts to obtain employment, maximize income, and minimize expenses." *In re Roberson* at 1136. Id. This does not mean that the debtor must have made payments to the creditor. Rather, "a failure to pay will not result in a finding of lack of good faith where the debtor has no funds to make any repayment." *In re Elebrashy,*

189 B.R. at 928; *see also Coats v. New Jersey Higher Educ. Assistance Auth. (In re Coats),* 214 B.R. 397 (Bankr. N.D. Okla. 1997); *Sands v. United Student Aid Funds (In re Sands),* 166 B.R. 299 (Bankr. W.D. Mich. 1994). Bankruptcy Courts have considered the following factors when determining whether the debtor has acted in good faith: 1) Whether the debtor attempts to repay the debt; 2) The length of time after the student loan becomes due that the debtor seeks to discharge the debt; 3) The percentage of the student loan debt in relation to the debtor's total indebtedness; 4) The debtor's attempts to find suitable employment. *McCormack v. Educational Credit Management Corp. (In re McCormack),* C/A No. 99-10637-W; Adv. Pro. No. 99-80401-W (Bankr. D.S.C. 07/06/2000); *Green v. Sallie Mae Serv. Corp (In re Green),* 238 B.R. 727, 736 (Bankr. N.D. Ohio 1999) (*quoting Cheesman v. Tennessee Student Assistance Corp. (In re Cheesman),* 25 F.3d 356, 360 (6th Cir. 1994)).

I had made minimum payments on the loans for several years after the loans became due and at least a year before filing for bankruptcy. I did not willfully cause my default on the student loan. I have made good faith efforts to repay the debt *Carlson v. UNIPAC Student Loan (In re Carlson),* Case No. 00-07519/W; Adv. Comp. No. 00-80255/W (Bankr. D.S.C. 05/18/2001; *Salinas v. United Student Aid Funds, Inc. (In re Salinas),* 240 B.R. 305, 314-15 (Bankr. W.D. Wis 1999) *Caulder v. Educational Credit Management Corp. (In re Caulder),* C/A No. 98-06808-W; Adv. Pro. No. 98-80273-W (Bankr. D.S.C. 04/06/1999); *In re Pena, 207 B.R. 919 (9th Cir. BAP 1997).*

The Courts equates my lack of effort for not to "bootstrap" myself into seeking an alternative payment plans the Respondent may have was regard as bad faith. My bad faith will be obvious if I had requested deferments on the loan payments. At the trial, the Bankruptcy Court probes weakness in my case, but need not inquire into factors that would work in my favor. For example, evidence of more than $12,000 in payments to the creditor, child support, extensive job search for a higher paying job and able to get a reduction of my rent from my landlord, etc.

My financial situation has deteriorated beyond my control due to the divorce action by my ex-wife. I have to be borrowing money from my pension to support myself. I had paid at least a total of $30,000 from August 1986 to July 1997 without any interruptions before my financial conditions suddenly changed and I could barely support myself. From the time of the loan was consolidated to the time I filed for bankruptcy, I had made at least a total of 46 payments averaging $267.86 each totaling $12,321.56 as stated in Appendix E, page 24a of this petition.

I commenced an extensive job search for a higher paying job since January 1999, when my divorce case was in the final stages till present. I have sent my resume and job applications to at least 20 potential employers and posted my resume on–line. I have been to several interviews where I was told that I made too much money than what they can afford to pay for the position. See copies of job applications and responses from potential employers.

In addition, I have intensified my job search since the Mayor of New York City issued a press released in October 31, 2002 that my previous agency will be merged with other agency and will result in a reduction of 50% work force from my agency. I continued the quest for job search when I received the laid off letter on January 6, 2003.

There is no doubt that I have a graduate degree in Management Auditing and MBA in Accounting. These degrees have not equates to professional progression in my line of work. My previous job, the individual who was my immediate supervisor only possess Bachelor Degree in a non-science field and do not have any accounting/auditing and construction experience. I am convinced and believe that I cannot get any high paying job than my previous job because the job market is very tight and my age is not in my favor.

I have done all I could to minimize my expenses and maximize my income. The expenses on my monthly expenditures are modest and are actually to enhance my ability to continue my employment search. I have been struggling to make ends meet since March 1997 and the struggle was compounded when I was laid off

in January 2003. I use credit card, borrow money from friends and my pension to augment my income as indicated in **Appendix S page 54a**. For example, I negotiated with my landlord for a reduction of my rent. As a result, the Landlord did not charge me the market rate, **Appendix V page 73a**. I use the Internet (which cost me $9.99 per month) for job hunting, to communicate with mother and my wife instead of the regular telephone service, which is very expensive, and I use it to obtain less expensive CPE credit on-line as compared to Instructor's led CPE class. In addition, I use it also for employment opportunities. I prepared my own food and do spend very little on breakfast and lunch at work. However, I do not take food to work and I sometimes ate breakfast (bagel and tea) at work and lunch (salad) during special occasions such as National Secretary/Boss day, Birthday and other events on the job. My religion does not permit me to eat out, except in a place where I am sure that the foods are prepared in accordance with my religion requirements.

The Respondent had never proposed any repayment assistance that is available or attempted to discuss any of the loan repayment modification options they have to offer. *In re Carlson*; id. The Court disagree with Defendant's implication that it is Plaintiff's responsibility to seek out every possible alternative payment plan available before she can meet the burden of demonstrating good faith. It is conceivable that there might be a charitable foundation in existence that would possibly provide Debtor with financial assistance; however, the Court is of the opinion that to put a debtor to the impossible burden to seek out every possible program in existence was not contemplated by Congress when §523(a)(8) was enacted. Also, *Douglas v. Great Lakes Higher Educ. Serv. Corp. (In re Douglas)*, 237 B.R. 652 (Bankr. N.D. Ohio 1999), the Court indicated that the Income Contingent Repayment Program (ICRP) is available only for loans held by the Department of Education. The ICRP repayment terms are available for most defaulted loans held by the Department of Education. Furthermore, the Court notes that under the ICRP, while the Federal Government may pay the educational lender in full, Debtor would in turn be indebted to the

Federal Government. Debtor would, in essence, be trading debt for debt, without any relief despite meeting the burden of proof on the three requirements of the *Brunner* test.

It was when I called Respondent (ECMC) on July 14, 2000 responding to their letter demanded full payment of the loan within specified period of time that the representative told me about the type of payment options they have available. As a matter of a fact, I initiated the conversation that led to the revelation of the payment options plan. After our conversation, I sent a letter to ECMC which they has yet to send me information on those three options that were mentioned to me during our telephone conversation, **Appendix W page 75a**.

IV BANKRUPTCY COURT and DISTRICT COURT DECISIONS

I started my employment with the City of in New York in August 1985 as a Management Auditor Trainee and did not stop driving yellow/livery cabs until 1989. **Appendix T page 57a** – bankruptcy court trial's transcript (Page 28 (lines 12 – 20)). In fact, I was told that I am over qualified for the entry-level position because I have MPS degree in Management Auditing. **Appendix T page 57a** - bankruptcy court trial's transcript (Page 29 (lines 16 – 25) and Page 30 (lines 2-25)).

My previous monthly income when I was employed was $3,218.00, while my monthly expenses were in the amount of $4,148 leaving me with a deficit of at least $930.00 per month as stated in Appendix Q, page 49a of this petition and **Appendix T page 58a & 59a** - bankruptcy court trial's transcript (Page 19 (lines 3-25) and Page 20 (lines 2-3)).

The Respondent (ECMC) provided its own analysis of what should be my take home pay, what deductions from my pay are essential and the expenses in my schedule of Income and Expenses that are acceptable to them in order to show the Bankruptcy Court that I have a surplus and I can afford to pay the student loan as

shown in **Appendix T page 59a to 64a** - bankruptcy court trial's transcript (Pages 54-69 and Page 70 (lines 2-22)). The Bankruptcy Court did not question the deductions from my gross income from my pay stub and was silent on whether my contributions into the pension system are a necessity or not. In addition, there are no statutory requirements that required employer to automatically enroll its employees in any pension plan. However, it is an option for the employees to join the pension and the employers will contribute their own matching share into the plan. Once an employee is enrolled in the pension plan it become mandatory to continue contributing into the plan while still employed until s/he has meet the pension plan statutory requirements and cannot stop contributing into the plan at will.

Deferred Compensation Plan (457 Def. Comp.): It is a statutory requirements mandated by the Federal Government that State, City, County and Local Governments' that have employees who are not in any pension plan or not participating in any Deferred Compensation Plan to start paying Social Security Tax or faced heavy sanction. As a result the New York City established Deferred Compensation Plan (DCP) in accordance to IRS Code 457 as directed by the Federal Government. My contribution to the retirement plans is the only asset I have and is a reasonable investment considering my age and lack of any other assets. *In re McCormack, Id.* This asset is almost depleted because I have to be drawing on it to support myself and my dependants since I have been laid off in January 2003 till present. There will be nothing left if I do not secure an employment soon.

Pension Loan: It was a loan that I took from my pension plan to augment my income. It was not taken to create an expense cushion as implied by the Respondent. Due to the fact that my employment was terminated, the loan does not exist anymore because the balance due was deducted from my pension account. In addition, I am not qualified to receive any pension because I was not vested before my employment was terminated. I cannot withdraw the contribution I made until I reached retirement age.

Deposit to a Credit Union Savings Account: This is a direct deposit to a saving account that I have with the Municipal Credit Union. This amount was included in my net monthly income. It is not a deduction as claimed by the respondent.

Pension Loan/Child Support: The Child Support was not a duplicative expense because it was not deducted from my monthly gross income in arriving at the available income.

Internet and Mobile Phone: I used it primarily for communicating with my ailing 70+ years old mother. My children also use it do research for their school works. Also, I use it to take the advantage of less the expensive CPE credit courses that are available on-line from recognized professional organizations. The mobile phone expenses are for maintaining constant contact with my daughters. When I obtained the mobile phone, Sprints is the only carrier that can provide me with the services requiring a deposit because I do not have good credit rating. **Appendix T page 64a & 65a** – bankruptcy court trial's transcript (Page 80 (lines 12-25), Pages81 – 82 and Page 83 (lines 2-21)).

Food: I ate breakfast (bagel and tea that cost only $1) at work and lunch (salad) twice a week and rarely eat dinner outside as indicated in **Appendix T page 66a** – bankruptcy court trial's transcript (Page 83 (line 25), Page 84 (lines 2-25), and Page 85 (lines 2-8)). The Respondent choice of word "most" and the Bankruptcy Court used the word "often" clearly contradicted my response word "rarely". The American Heritage Dictionary definition of the two words is as follow: Most – "greatest in number, quantity, size or degree". Often – "many times; frequently" Rarely – "not often; infrequently".

Transportation: Some of expenses were related to my former employment as indicated in **Appendix T page 66a & 67a** – bankruptcy court trial's transcript (Pages 86 (lines 5-25), 87 – 89 and 90 (lines 2-8)).

Summer Camps Expenses: This is in accordance with the Bronx County Supreme Court order as per the divorce stipulated agreement (pages 6 & 7) and decree as shown in Appendix R (Support and Custody of the Children)) and **Appendix T page 67a**

& 68a - bankruptcy court trial's transcript (Pages 96 (lines 5-25), 97 and 98 (lines 2-13)).

The Bankruptcy Court stated ..."Plaintiff has claimed a monthly shortfall of $930.00, when comparing monthly expenses to that of his monthly income. Plaintiff has not submitted a corresponding itemized schedule to arrive at his net available monthly take home pay. Plaintiff's interpretation of net monthly "available" take home pay differs considerably from that of the Court". The Bankruptcy Court did not provide the considerably difference figure as stated in its Opinion and Decision. The Bankruptcy Court did not question the deductions from my gross income from my pay stub appendix A- 54 and was silent on whether my contributions into the pension system are a necessity or not.

The Bankruptcy Court and District Court relied on the Respondent (ECMC) analysis of what they think should be my take home pay, what deductions from my pay are essential and what is acceptable to them from the expenses in my schedule of Income and Expenses. **Appendix T page 59a to 61a** – bankruptcy court trial's transcript (Pages 53 (lines 19-25), 54 - 56 (lines 2-23), 57 (line19), 59 – 60 and 61 (lines 2-22)).

The expenses such as food, summer camp, transportation, credit cards, mobile phone, and internet and miscellaneous which were not acceptable to the respondent. The Bankruptcy Court and District Court assertions that all the expenses could be eliminated have no merit. The only expenses that can be reduced but not eliminated are the mobile phone, Internet and Miscellaneous, which will not even improve my financial situations if eliminated. The Bankruptcy Court grossly misstated my testimony pertaining to food.... "that he did not prepare any of his meals at home and took meals at restaurants often". The Bankruptcy used the word "often" which is the opposite of the word "rarely" that I said during my testimony. The American Heritage Dictionary definition of the two words is as follow: Often – "many times; frequently". Rarely – "not often; infrequently".

Both courts willfully ignored the Bronx County Supreme Court sanctioned Divorce stipulated agreement and decree as

indicated in **Appendix R page 51a and Appendix T page 68a & 69a** – bankruptcy court trial's transcript (Pages 16(lines 14-25), 17(lines 2-5), 37(lines 5-12) and 107(lines 12-21)) and come up with their own definitions and interpretations of the agreement.

Further, the District Court and the Bankruptcy Court implied that granting me a discharge of $43,840 in unsecured debt should have improve my financial conditions and I should able to afford to make the minimum payments on the student loan. In fact, they forget that my voluntary filing for bankruptcy was a result of changing in my financial conditions in March 1997. Before I voluntarily filed for bankruptcy, my total monthly payment on the unsecured debt that was discharged including the student loan was approximately $ 1,600 a month. The garnishment of my wages for the child support obligations, which is approximately $1,700 a month, replaced the payments that I was making on the discharged debt. As a result, I was unable to make any payment on the unsecured debt and as such, I sought for a relief under Chapter 7 of the United States Bankruptcy Code.

CONCLUSION

This case presents issues of considerable urgency for me from becoming a destitute living in card box and will not be able to maintain a minimum standard of living. The U.S. Court of Appeals affirmation of the District Court judgment and order denying the discharge of the debt will create "undue hardship" on my dependants and me.

I did not willfully cause my default on the student loan. My financial condition has deteriorated beyond my control due to the divorce action by my ex-wife and was compounded when I was laid off on January 6, 2003. In July 1997, I found myself in a financial downward spiral and see that I will continue going deeper in debt and my financial situation has causes such stress that it interferes with my ability to work and sleep. For these reasons, I sought a relief under Chapter 7 of the United States Bankruptcy Code on June 2, 2002, which $37,000 in an unsecured debt was discharged.

Accordingly, I commenced an adversary proceeding seeking a determination to discharge my student loans under §523 (a) (8). Since that time till present, I have been using my credit cards and borrowing money from my pension and friends to augment my income and trying to make ends meet.

On January 06, 2003, my financial conditions take another down turn. Currently, I am unemployed since January, 2003, the unemployment benefits has run out and I do not have any steady source of income except for $120 derived from driving livery cab on a part-time basis. I do not have any health insurance coverage. I have to be withdrawing from my deferred compensation, which will be completely depleted in the nearest future if I do not get a job soon.

The expenses that I presented are not on actual need, but an estimated based on the available funds and it is consistent with my income with an estimated monthly deficit of approximately $2,577.00. *See Rivers v. United Student Aid Funds, Inc. (In re Rivers)*, 96-04212A (Bankr. S.D. Ga. Sept. 8, 1997). See also *In re Cheesman, id.* The Bankruptcy assertions that all the expenses could be eliminated are ambiguous and have no merit. The only expenses that can be reduced but not eliminated are the mobile phone and Internet, which will not even improve my financial situations.

The two loans were consolidated in July 1992 for a total amount of $29,770.59. In fact, the USF groups/Citibank record dated September 3, 1998, confirmed that the amount consolidated was $29,770.59 of which they received payments totaling $17,348.48. Based on the USF groups/Citibank record dated September 3, 1998, the outstanding balance on the consolidated loan should be $12,422.11 ($29,770.59 minus $17,348.48). This document was presented to the Appeal Court as appellant's exhibit 3 (DC – 31); to the District Court as exhibit 31 and to the Bankruptcy Court as exhibit 4. I had made at least a total of 46 payments, averaging $267.86 each, totaling $12,321.56 up to July 1997. The proof was presented to the U.S. Court of Appeals as appellant's

exhibit 3 (DC – 27); to the District Court as exhibit 27 and to the Bankruptcy Court as exhibit 4.

The U.S. Court of Appeals chose to ignore the evidence before it and concluded that.... several of the exhibits concerning the correct balance due on the loan were not submitted to the bankruptcy or district courts, and therefore, would not clarify this Court's "understanding of the process by which the District Judge reached the decision challenged on appeal."

The U.S. Court of Appeals also ignored the evidence that depict my current financial, economic and social status. The U.S. Court of Appeals stated in the summary order... this Court will not consider the additional evidence Opetubo submitted on the appeal because the majority of the documents reflect changes in Opetubo financial circumstances after the bankruptcy and district court decisions.

All of these documents and information of the additional evidence the were not available during the Bankruptcy adversary proceeding trial in October 16, 2001 or to the District court in May 2002 when I submitted my Appellant's brief. The events occurred after the District Court had issued its "Opinion and Order" affirming the Bankruptcy Court decision in June 2002. Therefore, the documents and information could not satisfy the requirements under Fed. R. App. P. 10(e)(1) and (2).

The Court fails to recognize that each change in my situation results in certain consequence. The evidence in question depicts my current financial, social and economic conditions, which is in line with the terms of 11 U.S.C. §523(a)(8) of the Bankruptcy Code and the application of the "Brunner tests". See *Brunner*, 831 F.2d at 396.

Likewise both the District Court and the Bankruptcy Court closed their eyes to the evidence before them and comes with their own definition of emancipation age, which was contrary to the Bronx County Supreme Court definition. In addition, based on their denial of discharging the loans, their decisions implied that I could somehow manufacture sufficient income to make even nominal

payments on the loan. Furthermore the District Court and the Bankruptcy Court engaged in projecting my future disposable income. Projecting income is a very difficult undertaking for a finder of fact. Such projections rest as much on evidence of future income prospects, which in this case is scant to nonexistent, as on common sense and experience, which are both highly subjective.

The U.S. Court of Appeals did not considered all the evidence that actual depict my current financial, economic and social status before them as the District Court and the Bankruptcy Court did on information that will work in my favor. Therefore, the U.S. Court of Appeals decision will create an "undue hardship" on me and my dependants and I cannot maintain a minimal standard of living under the meaning of §523 (a) (8).

For the reasons set forth, the petition for a writ of certiorari should be granted.

Respectfully submitted,

_____

Ahmed A.Opetubo, Pro Se
398 Lexington Avenue
Brooklyn, New York 11216

Date: April 14, 2004

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 11th day of September, two thousand and three.

Present:

HON. JON O. NEWMAN,
HON. RICHARD J. CARDAMONE,
HON. SONIA SOTOMAYOR,
Circuit Judges.

AHMED OPETUBO,

Appellant,

No. 02-5049

CITIBANK STUDENT LOAN CORP., et al.,

Defendants-Appellees

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FOR APPELLANT: AHMED OPETUBO, pro se, Brooklyn, NY.

FOR APPELLEE: DANIEL FISHER, Pullman & Comley (Sheila A. Denton, Pullman & Comley, on the brief), Bridgeport, Connecticut, for defendant-appellee Educational Credit Management Corporation.

UPON DUE CONSIDERATION of this appeal from the United States District Court for the Eastern District of New York (Ross, J.), it is hereby ORDERED, ADJUDGED, AND DECREE that the judgment of the district court is AFFIRMED.

Plaintiff-Appellant Ahmed Opetubo appeals from a judgment of the United States District Court for the Eastern District of New York (Ross, J.) affirming the bankruptcy court's denial of a discharge of Opetubo's student loan obligation. The district court determined that Opetubo failed to demonstrate that he would suffer undue hardship under this Court's three-part test in *Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F .2d 395, 396 (2d Cir. 1997) (establishing that in order to demonstrate that repaying the loan would cause "undue hardship" under 11 U.S.C. § 523 (a)(8), debtor must show that (1) he cannot maintain, based on current income and expenses, a minimal standard of living for himself and his dependents if forced to repay the loans; (2) additional circumstances exist indicating the this state of affairs is likely to persist for a significant portion of the repayment period for the student loans; and (3) the debtor has made good faith efforts to

repay the loans). On appeal, Opetubo argues that the district court erred in finding that he failed to meet the *Brunner* test and seeks a determination of the balance due on the defaulted loan.

When reviewing orders of the district court in their capacity as appellate courts in bankruptcy cases, this Court reviews determinations of law *de novo* and determinations of fact for clear error. *See In re Burger Boys.*, 831 94 F .3d 755, 759 (2d Cir. 1996). As an initial matter, this Court will not consider additional evidence Opetubo submitted on appeal because the majority of the documents reflect changes in Opetubo's financial circumstances after the bankruptcy and district court decisions. *See Brunner*, 831 F .2d at 396 (holding that the inquiry is based on debtor's "current income and expenses."). Moreover, several of the exhibits concerning the correct balance due on the loan were not submitted to the bankruptcy or district courts, and therefore, would not clarify this Court's "understanding of the process by which the District Judge reached the decision challenged on appeal." *See Salinger v. Random House*, 818 F .2d 252, 253 (2d Cir. 1987) (noting that parties may supplement a record on appeal pursuant to Fed. R. App. P. 10 (e) if anything material is omitted from or misstated in the record). Accordingly, no grounds exit to find that the district court or the bankruptcy court erred in calculating Opetubo's loan balance.

We find no clear error in the district court's application of *Brunner* and affirm the non-dischargeability of the student loan obligation substantially for the reasons stated by the bankruptcy and district court judges.

For these reasons, the judgment of the district court is AFFIRMED.

FOR THE COURT:
Roseann B. MacKechnie, Clerk

/s/ Oliva M George
By: Olivia M. George, Deputy Clerk

APPENDIX B

UNITED STATES DISTRIC COURT
EASTERN DISTRIC OF NEW YORK
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DISTRICT COURT

In Re:

02-CV-1353 (ARR)

AHMED A. OPETUBO,

NOT FOR PUBLICATION

Debtor.

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OPINION AND ORDER

Bankruptcy Court
Case No. 00-15984

Adv. Pro. No.
100-1690-260

ROSS, United States District Judge:

Appellant Ahmed A. Opetubo ("Opetudo" or "debtor") commenced this action in the district court, pursuant to 28 U.S.C. § 158 (a), seeking review of the decision of the bankruptcy court (Hon. Dennis E. Milton) denying appellant's discharge of a student loan in bankruptcy pursuant to 11 U.S.C.§ 528(a)(8). For reasons described below, the decision of the bankruptcy court is affirmed.

ISSUES TO BE DECIDED ON APPEAL

Under Rule 8006 of the Federal Rules of Bankruptcy Procedure, in an appeal to the district court from the decision of the bankruptcy court, an appellant must state specifically what decisions he wishes to appeal.1 In this case, the appellant objects to the decision of the bankruptcy court denying him discharge under 11 U.S.C. § 523 (a)(8) because he claims that failing to discharge his student loan obligations will create undue hardship on him and his dependents. Appellee Educational Credit Management Corporation ("ECMC" or "appellee") agrees that the issue presented to this court on appeal is whether the bankruptcy court correctly concluded that the student loan of the debtor is not dischargeable pursuant to Section 523(a)(8).

FACTUAL BACKROUND

APPELLANT Opetubo is a fifty-two year-old divorced father of two children, ages thirteen and seventeen, who reside with his ex-wife. Appellant has a bachelor's degree in Economics and graduate degrees in management auditing and accounting. Currently, he is employed as an audit manager for the New York City School Construction Authority and earns a yearly gross salary of approximately $69,733.04.

In 1992, Opetubo consolidated two student loans for a sum of $29,770.59, loans he had taken to help finance his graduate education. Citibank Student Loan Corporation was appellant's lender and USA group, Inc. was the guarantor. The terms of this consolidated student loan included a nine percent interest rate, a

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1Appellee brought a motion before the bankruptcy court arguing that the appellant designated as part of the record on appeal many items, which were not part of the proceedings before the bankruptcy court, in violation of the Federal Rules of Bankruptcy Procedure. The court, in deciding this case, has not considered evidence that was unavailable to the bankruptcy court.

twenty-year repayment period1, and a monthly payment of $267.86. Opetubo made payments on this loan from approximately August or December 1992 to June 1997. When the appellant defaulted on this loan in 1997, Citibank invoked the guarantee of USA Group, Inc., and USA group assigned its interest in the loan to appellee, ECMC.

Opetubo filed a voluntary petition for relief under Chapter 7 on June 2, 2000, and the bankruptcy court granted a discharge of approximately $43, 840.00 in unsecured debt on July 13, 2000. Subsequently, appellant filed an adversary proceeding seeking discharge of a consolidated loan pursuant to Section 532 (a)(8) of the Bankruptcy Code. Following a bench trial, Bankruptcy Judge Milton found that Opetubo had not proven by a preponderance of the evidence that his repayment of his student loan would be an undue hardship, and thus declined to discharge his debt. Opetubo filed a notice of appeal on February 14, 2002.

DISCUSSION

At issue on appeal is Section 523(a)(8) of the Bankruptcy Code, which provides, in relevant part, that

> [a] discharge under 727, 1141, 1228(a0, 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt for ... an educational benefit overpayment or loan guaranteed by a government unit, or made under any program funded in whole or in part by a government unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless expecting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents.

11 U.S.C. § 523 (a)(8). The Second Circuit explained the congressional policy behind this statute in In re Renshaw:

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1 The record is not exactly clear with respect to the term for repayment of appellant's student loan, although appellant, in his Reply Brief at 24, estimates that the repayment term was twenty years at the time he consolidated.

> Congress enacted § 523(a)(8) because there were evidence of an increasing abuse of the bankruptcy that the viability of educational loan programs and harm to future students as well as taxpayers. Congress recognized that this is an instance where a creditor's interest in receiving full payment of the debt outweighs the debtor's interest in a fresh start.

222 F .3d 82, 87 (2d Cir. 2000). The debtor must demonstrate by a preponderance of the evidence that the undue hardship exception applies such that the court should discharge his student loan. See id. at 86. to help courts assess whether , the Second Circuit approved a three part test in Brunner v. New York Higher Education Services Corp, 831 F .2d 395, 396, (2d Cir. 1987), namely, "(1) that the debtor cannot maintain, based on current income and expenses, a 'minimal' standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans." Appellant must satisfy each of these three prongs.

When reviewing the decisions of a bankruptcy court, the district court applies a de novo standard of review as to questions of law and a "clearly erroneous" STANDARD as to questions of fact. Bankr. R. 8013. See, e.g. In re Nemko, 202 B.R. 673, 677 (E.D.N.Y. 1996). The Second Circuit clarified in Brunner, however, that the question "[w]hether not discharging [appellant]'s student loans would impose on [him] 'undue hardship' under 11 U.S.C. §523(a)(8) ... requires a conclusion regarding the legal effect of the bankruptcy court's finding as to [his] circumstances." Thus, this court reviews the bankruptcy court's finding of fact for clear error and its application of the Brunner test to these facts de novo.

A review of the record demonstrates that the bankruptcy judge did not commit clear error in finding the vast majority of the facts that comprise the factual background of his decision, such as appellant's current income and the amount of various deductions reflected on his pay stub. Although the bankruptcy court did

misstate the age of appellant's children, this error certainly does not impact its ultimate ruling on the law.

Nor did the bankruptcy court misapply Brunner to these facts in concluding that appellant had failed to demonstrate that he would suffer undue hardship if the court did not discharge his student loan. With regard to the first prong, the bankruptcy court found that petitioner did not demonstrate by a preponderance of the evidence that he would not be able to maintain a minimal standard of living if he were to forced to repay his loan. In reaching this conclusion, the bankruptcy judge cited to appropriate legal principles, including that the court is to consider current income and expenses and determine a minimal standard of living level, which is sensitive to the particular circumstances of the case.

The court finds that Judge Milton engaged in a sensitive and balanced inquiry of appellant's finances. The trial transcript reveals that Judge Milton asked many thoughtful, probing questions to test appellant's budget. He respected that appellant's divorce settlement required certain expenses, such as life and health insurance and even $250 monthly in summer camp expenses for children who are aged thirteen and seventeen. What predominantly troubled the bankruptcy court were certain voluntary monthly expenses, such as pension contributions, deposit into a savings account, and a deferred compensation plan, totaling over one thousand each month. This court agrees that these elective costs are not required for appellant to maintain a minimal standard of living. While it surely is reasonable and even responsible to save money for retirement to supplement Social Security income, it is not necessary for appellant to do so to sustain a minimal standard of living.

Further, this court agrees that appellant could take additional economizing measures, including reducing or eliminating the $100 per month miscellaneous expenses, $43 per month on a mobile phone, $21 per month for cable, and $27 per month for internet service. The court appreciates appellant's explanations of these costs, including his desire to provide entertainment for his children when they visit, to be accessible to them in the event of a crisis, and to use more economical means of communicating with his mother

who is in Nigeria. These good intentions, however, do not mean that these expenses are necessary to sustain a minimal standard of living. Rather, appellant could, as the bankruptcy judge suggested at the trial, use a beeper at a fraction of the cost of a mobile phone, to permit his children to reach him on demand, and use the internet at public libraries to correspond with his mother. As for entertaining his children, cable television is certainly not necessary to a minimal standard of living. Further, the court finds that it is not necessary to sustain a minimal standard of living to buy lunch twice weekly, "office politics," see Tr. At 84, notwithstanding.

Thus even assuming that appellant has established a $930 monthly shortfall – which this court assumes solely for the purpose of his appeal – the courts finds that a combination of economizing measures and adjustments to or the elimination of various elective expenses would permit him to have a balanced budget such that he can sustain a minimal standard of living while paying his student loan payment of less than $300 per month. As a result, appellant cannot satisfy the first prong of the Brunner analysis.

Further, even were the court to find that appellant has satisfied prong one, the court agrees with the bankruptcy court that appellant cannot demonstrate that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the fifteen-year repayment period of the student loans.1 A substantial reason for appellant's tight budget is his responsibility for approximately $1500 per month in child support, an obligation that will persist, under his divorce agreement, until his children reach age of twenty-one.2 As his children are seventeen and thirteen, half of this obligation will expire in approximately four years, and the other portion will expire in eight years. Additionally,

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1 Because there is evidence that appellant made payments on his consolidated loan for approximately five years, the court assumes that the remaining repayment period is approximately fifteen years in length.

2 It is somewhat unclear in the record whether this obligation will terminate when his children reach eighteen, should they choose not to attend college. The court assumes arguendo that his obligation will extend to the age of twenty-one regardless of children's college attendance.

it is difficult to image that appellant's teenage children will continue attending –if in fact they continue to attend – summer camp such that he will have $250 more available to him every month in the very near future. Thus, appellant cannot demonstrate that his financial imbalance is likely to persist for a substantial portion of his repayment period.1

Finally, although this prong is not as clear, the court finds that appellant has not sufficiently demonstrated good faith efforts to repay his loans. The court notes that appellant made many payments towards his student loans both before consolidation and thereafter. This is not a case in which a debtor seeks to discharge his student loans soon after his obligation to repay the loans originated. Further, the court recognizes that appellant has responded to numerous job listings in an attempt to secure a higher paying job. But the court finds that the numerous ways in which appellant could adjust his expenditures, as previously discussed, or that appellant has not chosen an alternate repayment plan demonstrate a lack of good faith in his efforts to comply with his repayment obligations.

CONCLUSION

For the reasons described above, the court affirms the decision of the bankruptcy court.

SO ORDERED.

/s/ Allyne R. Ross
Allyne R. Ross
United States District Judge

SERVICE LIST:

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1 Appellant argues that his obligation to pay half of his children's college costs should satisfy prong two. There is no evidence in the record that his children will attend college or that, even if one or both do, they will not receive financial aid, scholarships, or attend public or community colleges. The court would need to speculate as too many variables to find that this hypothetical obligation satisfies appellant's burden on this second prong.

Debtor Pro Se
Ahmed A. Opetubo
398 Lexington Avenue
Brooklyn, NY 11216

Attorney for Appellee
Douglas Morabito
Pullman & Comley, LLC
850 Main Street
P.O. Box 7006
Bridgeport, CT 06601-7006

cc: Magistrate Judge Pohorelsky
Bankruptcy Judge Milton

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL UNITED STATES COURTHOUSE
40 FOLEY SQUARE
NEW YORK, NY 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of new York, on the 18th day of November two thousand three.

Opetubo

Plaintiff-Appellant

v

Dkt No: 02-5049

Citibank Student

Defendant-Appellee

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Ahmed A. Opetubo.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE, Clerk

/s/ By: Laura Bass Penn
Laura Bass Penn
Motions Staff Attorney

APPENDIX D

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRIC OF NEW YORK

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In re

Case No. 00-15984-633

AHMED A. OPETUBO.

Chapter 7

Debtor.

----------x

AHMED A. OPETUBO,

Adv. Proc. No. 00-1690-633

Plaintiff,

-against-

CITIBANK STUDENT LOAN CORPORATION, UNITED STUDENT AID FUNDS, INC., and EDUCATIONAL CREDIT MANAGEMENT CORPORATION,

Defendants

----------x

OPINION AND DECISION

APPEARANCES:

Ahmed A. Opetubo
398 Lexington Avenue
Brooklyn, NY 11216
Debtor and Plaintiff Pro Se

Sheila A. Denton, Esq.
Pullman & Comley, LLC

850 Main Street
P.O. Box 7006
Bridgeport, CT 06601-7006
Attorney for the Defendant Educational Credit
Management Corporation

DENNIS MILTON, United States Bankruptcy Judge

In this adversary proceeding (the "Adversary Proceeding"), debtor Ahmed A. Opetubo (the "Plaintiff") seeks the entry of an order determining certain student loans dischargeable as an "undue hardship" pursuant to 11 U.S.C. § 523(a)(8). On October 16, 2001, the Court held a trial on this matter. Foe the reasons stated below, this Court finds that the Plaintiff has failed to meet his burden in proving that the repayment of his student loans has imposed and/or would impose an undue hardship, and judgment is awarded to the defendants.

This Court has jurisdiction over this core proceeding under 28 U.S.C. §§1334(b) and 157(b)(2)(I) and the Eastern District of New York standing order of reference dated August 28, 1986. This decision constitutes the Court's findings of fact and conclusions of law to the extent required by Fed. R. Bank. P. 7052.

FACTUAL BACKROUND

On June 2, 2000, Plaintiff filed a voluntary petition for relief under Chapter 7 of the United States Bankruptcy Code in the Eastern District of New York. On or about July 13, 2000, the trustee filed a report of no assets in this case. On October 3, 2000, the Court entered an order granting Plaintiff a discharge as to approximately $43,840.00 in unsecured debt, the majority of which was consumer debt. On October 13, 2000, the case was closed. On or about November 6, 2000, the Court entered an order reopening the case for the purpose of bringing an adversary proceeding. On January 25, 2001, defendant Educational Credit Management Corporation ("ECMC") filed an answer.

The evidence at trial was as follows. Plaintiff is 52 years old and currently resides alone in a two-bedroom apartment in Brooklyn, New York. He is divorced and has two children ages 16 and 14 respectively. The children reside with Plaintiff's former spouse. Plaintiff attended Concordia University in Canada from 1974 to 1978, where he received a bachelor's degree in Economics. Plaintiff next attended the New School for Social Research in New York City from 1982 to 1985, where he earned a MPS in Management Auditing. Plaintiff then earned an MBA in accounting at Long Island University in Brooklyn, New York in 1991. Plaintiff financed his education at the New School for Social Research and Long Island University through student loans. In 1992, Plaintiff consolidated all of his outstanding student loans in the sum of $29,770.59. Pursuant to the consolidated loan agreement, Plaintiff was required to make one payment each month in the amount of $267.86.

Citibank Student Loan Corporation ("CSLC") is the lender that consolidated the loan in 1992. USA Group Inc. guaranteed the consolidated loan and serviced the loan through its affiliate United Student Aid Funds, Inc. (collectively, "USA Group"). Plaintiff defaulted under the terms of the consolidated loan agreement. CSLC invoked the guarantee of USA Group, which had assigned its interest to ECMC.

Plaintiff made his required student loan payments from 1992 until approximately June 1997. Plaintiff attributed that default and subsequent defaults upon hardship created when his wages began to be garnished under a New York State Court order to provide for child support as part of his agreement.

Plaintiff is presently employed as an audit manager for the New York City School Construction Authority, where he has been working since August 1990. His gross yearly income currently is $69, 733.04. Plaintiff's biweekly pay stubs reflected a gross monthly income of approximately $5,811.09. The pay stubs showed deductions for items such as the repayment of a pension loan in the monthly amount of $219.42, a pension contribution in the monthly amount of $174.33, a deferred compensation contribution in the

monthly amount of $421.05 and a deposit to credit union savings account in the monthly amount of $216.67. Plaintiff testified at trial that these payments were made solely at his election. The pay stubs also reflected deductions for both health and life insurance premiums. The Plaintiff testified that he is required to maintain the health and life insurance policies as a term of his divorce agreement. Plaintiff presented no evidence of any disabilities or of any long term mental or physical illness.

DISCUSSION

Plaintiff seeks a discharge of his student loan obligations pursuant to Section 523(a)(8) of the Bankruptcy code. Section 523(a)(8) of the Bankruptcy Code provides in pertinent part:

> (a) A discharge under section 727,1141,1228(a),1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt –
>
> (8) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor or debtor's dependents:

11 U.S.C. § 523(a)(8). The exception for dischargeability of student loans reflects a departure in both substance and policy from the dominant theme of the Bankruptcy Code to afford the worthy debtor a "fresh start." Alibatya v. New York Univ., 178 B.R. 335, 337 (Bankr. E.D.N.Y. 1995). In general, the unsecured status of most student loans, coupled with the fact that many graduates of higher learning institutions have little or no assets that would be affected by

a bankruptcy filling at the time of their graduation, made such loans very susceptible to a discharge in bankruptcy without the attendance burdens normally associated with a bankruptcy filing. Cazenovia College v. Renshaw(In re Renshaw). 222 F.3d 82, 87 (2d Cir. 2000). The Renshaw Court explained the public policy for the exception to the discharge of student loans as follows: "Congress enacted § 523(a)(8) because there was evidence of an increasing abuse of the bankruptcy process that threatened the viability of educational loan programs and harm to future students as well as taxpayers." The guaranteed student loan program, by its very nature engages in high risk loans that which many commercial lenders would not undertake to offer, or alternatively, would offer a t a substantially higher interest rate to reflect the inherent risks in such loans. Brunner v. New York State Higher Educ. Servs. Corp. (In re Brunner), 46 B.R. 752, 756 (S.D.N.Y. 1985), aff'd 831 F.2d 395 (2d Cir. 1987).1

Plaintiff maintained that the repayment of his student loan obligations would impose an "undue hardship" on him. Although there is no statutory definition of undue hardship, the Second Circuit Court of Appeals has determined that a debtor must satisfy a three-part test in order to demonstrate undue hardship under Section 523(a)(8) of the Bankruptcy Code. Brunner v. New York State Higher Educ. Servs. Corp. (In re Brunner), 46 B.R. 752, 756 (S.D.N.Y. 1985), aff'd 831 F.2d 395 (2d Cir. 1987); United States v. Reid, No. 96-CV-2004, 2000 U.S. Dist LEXIS 2187, at *7 (E.D.N.Y. Jan. 21, 2000); In re Stein, 218 B.R. 281 (Bankr. D. Conn. 1998); Borrero v. Connecticut Student Loan Found., No. 97cv

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1 In addition to student loans, Congress has excepted other obligations from dischargeability for public policy reasons. As the Supreme Court has recognized. "[t]he statutory provisions governing dischargeability reflect a congressional decision to exclude from the general policy of discharge certain categories of debts—such as child support, alimony, and certain unpaid educational loans and taxes, as well as liabilities for fraud." Grogan v. Garner, 498 U.S. 279, 287,111 S. Ct. 654, 659, 112 L. Ed. 2d 755, 765 (1991). "Congress evidently concluded that the creditors' interest in recovering full payment of debts in these categories outweighed the debtors' interest in a complete fresh start." Id: See also Cazenovia College v. Renshaw). 222 F .3d 82, 87 (2d Cir. 2000).

1382. 1997 U.S. Dist. LEXIS 17714, at *5 (D. Conn. Oct. 20 1997). To prevail on this claim, a debtor must show: (1) that he cannot maintain, based on current income and expenses, a "minimal" standard of living for himself and his dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the student repayment period; and (3) that he has made good faith efforts to repay the loans. In re Brunner, 831 F .2d at 396.1

The burden of proof in showing "undue hardship" under §523(a)(8) of the Bankruptcy Code rests on the debtor. In re Stien, 218 B.R. at 287 (citations omitted). In discharge exception proceedings, Congress intended that the preponderance of the evidence standard apply. Grogan, 498 U.S. at 287; See also Kopf v. United States Dep't of Educ, In re Kopf, 245 B.R. 731, 734 (Bankr. D. Me. 2000).

A. Ability to Maintain A minimal Standard of Living

In order to obtain a discharge, a debtor must first establish that he cannot
maintain, based on current income and expenses, a "minimal" standard of living for himself and his dependents if forced to repay the loans. In re Brunner, 831 F .2d at 396. to meet this element, the debtor must present "more than showing of tight finances." In re Faish, 72 F .3d at 306. In reaching the determination with regard to proof of this element, the Court is to analyze "current income and expenses and determine, through the application of common sense, a minimal standard of living level which is sensitive to the particular circumstances of each case." Elmore v. Massachusetts Higher Educ.

1 The Third Circuit of Appeals, in adopting this standard, also emphasized the public policy concerns its application addressed: "[T]he Brunner standard safeguards the financial integrity of the student loan program by not permitting debtors who have obtained the substantial benefits of an education funded by taxpayer dollars to dismiss their obligation merely because repayment of the borrowed funds would require some major personal and financial sacrifices." Pennsylvania Higher Educ. Assistance Agency v. Faish (In re Faish), 72 F .3d 298, 306 (3d Cir. 1995).

Assistance Corp. (In re Elmore), 230 B.R. 22, 26 (Bankr. D. Conn. 1999); In re Stien, 218 B.R. at 287. The analysis should also determine whether or not there is potential in the plaintiff's budget for "economizing measures" that may enable such plaintiff to repay his student loan debt. See Downey v. Sally Mae, Inc. (In re Downey), 255 B.R. 72, 76 (Bankr. N.D. Fla. 2000).

Plaintiff has claimed a monthly shortfall of $930.00, when comparing his monthly expenses to that of his monthly income. Plaintiff has submitted an itemized schedule of his monthly expenses. Plaintiff has not submitted a corresponding itemized schedule to arrive at his net available monthly take home pay. The Plaintiff offered the conclusion that his net monthly available take home pay from his $5,811.09 gross monthly wages is $3,218.00. Plaintiff's interpretation of net monthly "available" take home pay differs considerably from that of the Court. The testimony of the Plaintiff confirmed that the sum of $1,031.47 per month is taken in four separate deductions from his paycheck for a pension loan, a pension contribution, a contribution to a deferred compensation plan and a deposit into a credit union savings account. By his admission, Plaintiff elected these deductions. The Court finds these deductions are elective, and not required for the Plaintiff to maintain a minimal standard of living.1 Upon review of plaintiff's trial testimony and schedule of expenses includes such items as $250.00 per month for summer camp, approximately $300.00 in credit card payments, $100.00 for miscellaneous expenses, $260.00 per month for transportation, $43.00 for a mobile phone, $27.00 for internet service and $21.00 for cable television service. The Plaintiff also testified that he did not prepare any of his meals at home and took meals at restaurants often. All of the above expenses could be reduced or eliminated as not necessary to maintain a minimal standard of living.

---

3 Plaintiff argued at the trial that pursuant to his divorce agreement he is required to maintain both life and medical insurance for the benefit of his children, and premiums for insurance are also deducted directly from his paycheck. The Court did not considered these individual deductions for premium payments as evidence of Plaintiff failure to minimize expenses.

The Court also recognized the inclusion of the repayment of the pension loan in the schedule of monthly expenses as duplicative, because an automatic deduction from Plaintiff's paycheck is taken for the same purpose. For all of the above reasons, the Court finds that the Plaintiff has not shown that the monthly payment he must make pursuant to his student loan obligations will cause him and his dependents to fall below a minimal standard of living, and therefore has failed to meet his burden with reference to the first prong of the Brunner test.

B. Continuation of Hardship Circumstances for Significant Portion of Repayment Period

In addition to a current inability to pay, the debtor must show that there are additional circumstances, which strongly suggest that such current inability will extend for a significant portion of the repayment period of the loan. In re Brunner, 831 F .2d at 396. Other courts have found "'dischargeability of student loans should be based upon certainty of hopelessness, not simply a present inability to fulfill financial commitment.'" Brightful v. Pennsylvania Higher Educ. Assistance Agency (In re Brightful) 276 F .3d 324, 328 (3d Cir. 2001) quoting In re Brunner, 46 B.R. at 755, and Briscoe v. Bank of New York (In re Briscoe), 16 B.R. 128, 131 (S.D.N.Y. 1981).

Here, Plaintiff stated that he was able to make his loan payments from 1992 up until the time he began making child support payments in the amount of approximately $1,500.00 per month in 1997. the Plaintiff's children are 16 and 14. Pursuant to the representations and testimony of the Plaintiff, the support obligation with reference to each child ends when the child reaches the age of 18, unless the child attends college and in that case it is extended until the child reaches the age of 21. This means that the Plaintiff's obligation in the amount of $1,500.00 per month will be in place for a maximum of five years. After that time the Plaintiff's obligation to pay child support will, at a minimum, be reduced by one half by virtue of his oldest daughter turning 21. If either or both of the

Plaintiff's children do not attend college, Plaintiff's obligation will be reduced or even eliminated at a date earlier than five years from now.

Additionally, the Plaintiff has not demonstrated by a preponderance of the evidence that his prospects for obtaining a job that pays a higher salary than his present job are completely foreclosed. The plaintiff has a degree in Management Auditing and an MBA in Accounting. He has substantial experience and has demonstrated a steady pattern of professional progression throughout his tenure with the New York City Construction Authority. Plaintiff testified that he cannot procure a higher paying job and submitted proof of several job listings and the accompanying correspondence remitted in connection with such listings.

In sum, Plaintiff has failed to demonstrate the exceptional circumstances that are necessary in order to meet his burden under the second prong. Opetubo is intelligent physically healthy, currently employed, possesses useful skills as well as an advanced degree and has no extraordinary, non discretionary expenses. Plaintiff has failed to meet his burden of proof under this second prong of the Brunner test.

C. Debtor' Good Faith to repay the Student Loans

Under the third prong of the Brunner test, Plaintiff must prove that he has made a good faith effort to repay the loans. Good faith measured by efforts to obtain employment, maximize income and minimize expenses. Although the concept of "undue hardship" includes that plaintiff may neither willfully nor negligently cause the default in repayment, the condition must arise from "factors beyond his reasonable control." In re Robeson, 999 F .2d 1132,1136 (7th Cir. 1993); In re Briscoe, 16 B.R. at 130-31, quoting Comm'n on Bankruptcy Laws of the United States, Report, H.R. Doc. No. 137, 93d Cong, 1st Sess., Pt. II, at 140 n.16 (1977).

Plaintiff has obtained employment commensurate with his advanced degree, and thus fulfilled the obligation to maximize

income. However, Plaintiff has not minimized expenses post-petition and failed to seek any deferment of payments following issuance of the court order, which he claimed brought about his current hardship condition. Such conduct does not reflect a good faith attempt to repay his student loans.

CONCLUSION

After reviewing the evidence and after carefully considering all the arguments of the debtor and counsel for the defendant, the Court is not satisfied that Plaintiff has established by a preponderance of the evidence that there exists such an undue hardship that discharge of his student loans is warranted.

Dated: Brooklyn, New York
February 4, 2002

/s/ Dennis E. Milton
ENNIS E. MILTON
United States Bankruptcy Judge

APPENDIX E

USAGROUP LOAN DOCUMENT

The following information was taken from the document date stamped SEP 15 1998:

'Request for Claim Reimbursement USAGROUP Guarantee Services'
USA GROUP GUARANTEE SERVICES CLAIM REVIEW 8362-8320 CRAIG STREET INDIANAPOLIS IN 46250 (3 7)578-6937

Section 1 Borrower information:
SS# 100-64-1767, Name: OPETUBO, AHMED A; Address: 398 Lexington Avenue, Brooklyn NY 11216; Tel.: 718-398-4738

Section 2:
Type of Loan: Default

Section 3:
Amount of Disbursement - $29,770.59; Interest Method: Simple Interest; Interest Paid Through Date: 01/02/98
Total Payments and Refunds Received: $17,348.48

Sections 4, 5, 6, 7 and 8: (Information contained in these sections were not legible.)

Section 9:
Lender/Servicer Address for Returned Claims:
Name of Lender/Servicer - Citibank Student Loan Corporation
Address – 99 Garnsay Road Pitts ford, NY 14534
Tel.: (716) 248-7834; (716) 248-7244
Officer Name Title: Kathleen M. Osbourne, Assistant Vice President.
Date: 9/3/98.

BEST AVAILABLE COPY

APPENDIX F

LIST OF PAYMENT MADE ON THE LOAN.

The following information in the table was obtained from the canceled checks (a total of 46 payments totaling $12,433.11).

Citibank Canceled Checks:				
DATE	CHECK No.	AMOUNT	DATE	CHECK N
1. 12/18/92	1481	$296.88	25. 08/09/96	0125
2. 12/20/92	1483	$267.86	26. 08/11/96	0131
3. 01/18/92	1496	$267.86	27. 12/05/96	1955
4. 09/20/93	1626	$344.79	28. 05/19/97	0195
5. 11/01/93	1648	$267.86		
6. 12/03/93	1670	$267.86	Municipal Credit Union Canc	
7. 01/03/94	1689	$267.86	29. 07/10/94	0101
8. 01/31/94	1706	$267.86	30. 08/21/94	0123
9. 02/13/93	1504	$267.86	31. 09/15/94	0134
10. 04/27/93	1543	$267.86	32. 10/09/94	0146
11. 06/14/93	1569	$267.86	33. 01/17/95	0193
12. 07/17/93	1588	$267.86	34. 01/23/95	0199
13. 08/30/93	1611	$267.86	35. 02/15/95	0201
14. 04/05/95	1856	$267.86	36. 03/15/95	0219
15. 05/09/95	1866	$267.86	37. 01/08/96	0484
16. 09/14/95	1887	$267.86	38. 06/20/95	0261
17. 04/14/96	102	$535.72	39. 02/19/96	0368
18. 06/28/96	107	$535.72	40. 10/10/95	0308
19. 02/21/94	1724	$267.86	41. 12/05/95	0334
20. 03/22/94	1741	$267.86	42. 07/02/95	0268
21. 04/22/94	1763	$267.86	43. 10/26/95	0315
22. 06/14/94	1787	$267.86	44. 01/08/96	0348
23. 12/16/94	1837	$267.86	45. 02/09/97	0498
24. 07/16/96	0117	$267.86	46. 06/10/97	0579

APPENDIX G

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

In re: Chapter 7

AHMED A. OPETUBO Case No. 00-15984

Debtor

AHMED A. OPETUBO

Adv. Proceeding No. 100-1690-260

Plaintiff

v.

Hon. Dennis E. Milton

CITIBANK STUDENT LOAN CORPORATION, UNITED STUDENT AID FUNDS, INC., AND EDUCATIONAL CREDIT MANAGEMENT CORPORATION

Defendants

November 05, 2001

PLAINTIFF'S POST TRIAL STATEMENTS

This matter comes before the Court on October 16, 2001, upon a complaint to Determine Dischargeability of certain student loans obligations filed by the Plaintiff/Debtor on December 6, 2000.

In this case, I disagree with $46,123.83 (Item No. 15, Page 4 of Exhibit B) as the balance due on the student loans that ECMC claimed that I owed. The loans were consolidated in July 1992 as

shown in Exhibit A, for a total of 29,770.59 as in Exhibit 4. in fact the first monthly payment on the consolidated loan was on December 18, 1992 in the amount of $296.88. I continued to make the monthly payment on the loan without any deferments or interruptions until July 1997 when a bi-weekly garnishment of $825 for Child Support Order based on my Divorce case that was started I July 1996 at the Bronx County Supreme Court. The defendant did not account for all the payments I had made after consolidation of the loans. **(These statements were on page six of the Plaintiff's Post Trial Statements).**

2.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re:

AHMED A. OPETUBO

Debtor

AHMED A. OPETUBO

CV 02 1353 (ARR)

Appellant

vi.

CITIBANK STUDENT LOAN CORPORATION, UNITED STUDENT AID FUNDS, INC., AND EDUCATIONAL CREDIT MANAGEMENT CORPORATION

Appellee, March 28, 2002

APPELLANT'S BRIEF

47. The two loans were consolidated in July 1992 for a total amount of $29,770.59 as in Exhibit 4. I made the first payment of $296.88 on the consolidated loans and had made at least a total of 46 payments averaging $267.86 each totaling $12,321.56. These payments were not reflected by the defendant in arriving at the amount of $46,123.83 claimed to be the balance owed on the consolidated loan. In fact, the USFG groups/Citibank record dated September 3, 1998 showed that a total of $29,770.59 was disbursed and total payments and refund received was $17,348.48 (EXHIBIT 31). This document was presented as exhibit 4 in the Post Trial Statement (Exhibit 10 of this Brief). **(This statement was on Paragraph 47 of the Appellant Brief.)**

3.

02 – 5049

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

AHMED A. OPETUBO, Pro Se
Plaintiff - Appellant

vs.

CITIBANK STUDENT LOAN CORPORATION; UNITED STUDENT AID FUNDS, INC., AND EDUCATIONAL CREDIT MANAGEMENT CORPORATION
Defendants –Appelles

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF APPELLANT

Ahmed A. Opetubo, Pro Se
398 Lexington Avenue,
Brooklyn, NY 11216
Phone: (718) 398-7283

ARGUMENTS

I Determine the correct balance due on the defaulted student loans.

I am requesting this Court to determine the correct balance due on the defaulted loan. I had made my disagreement known to both the Bankruptcy Court and District Court on the $46,123.83 that ECMC claimed that I owed as the balance on the student. See page 24 para. 47 of the Appellant's brief submitted to the District Court (**Exhibit 3**), also page 6, first paragraph of the plaintiff' post trial statements **Exhibit 3** (DC – 10). I believe that the balance due on the student loan is much less than the $46, 123.83. Both Courts did not address the issue of the balance due on the student loan. The two loans were consolidated in July 1992, for a total amount of $29,770.59 as in **Exhibit 3.** (DC – 31). In fact, the first monthly payment on the consolidated loan was on December 18, 1992 in the amount of $296.88. I continued to make the monthly payments on the loan without any deferments or interruptions until July 1997 before a bi-weekly garnishment of $825 for Child Support Order based on my Divorce case started in July 1996 at the Bronx County Supreme Court. The defendant did not account for all the payments I had made after consolidation of the student loans. In fact, I had made at least 46 payments averaging $267.86 each totaling $12,321.56 from December 1992 through June 1997 on the defaulted consolidated loan. (This statement was on Page 12 of the above caption.)

The two loans were consolidated in July 1992 for a total amount of $29,770.59. **Exhibit 3** (DC – 31). I made the first payment of $296.88 on the consolidated loans and had made at least a total of 46 payments, averaging $267.86 each, totaling $12,321.56 up to July 1997. **Exhibit 3** (DC – 27). These payments were not reflected by the defendant in arriving at the amount of $46, 123.83 claimed to be the balance owed on the consolidated loan. In fact, the USF groups/Citibank record dated September 3, 1998 showed

that a total of $29,770.59 was disbursed and total payments and refund received was $17,348.48 **Exhibit 3** (DC – 31). (This statement was on Pages 17 and 18 of the above caption).

4. **02 – 5049**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AHMED A. OPETUBO, Pro Se
Plaintiff - Appellant
vs.
CITIBANK STUDENT LOAN CORPORATION; UNITED STUDENT AID FUNDS, INC., AND EDUCATIONAL CREDIT MANAGEMENT CORPORATION
Defendants –Appelles

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF OF APPELLANT

Ahmed A. Opetubo, Pro Se
398 Lexington Avenue,
Brooklyn, NY 11216
Phone: (718) 398-7283

a. **Educational Loans**

The student loans were used to primarily finance my education in the United State of America, the New School for Social Research in New York City from 1982 to 1985 and the Long Island University in Brooklyn, NY from 1987 to 1991, not in any foreign country, namely, Canada as alluded by the Appellee. [Appellant's Exhibit 7.] The two loans were consolidated in July 1992 for a total amount of $29,770.59. [Appellant's Exhibit 3 (DC – 31).] I made

the first payment of $296.88 on the consolidated loans and had made at least a total of 46 payments, averaging $267.86 each, totaling $12,321.56 up to July 1997. [Appellant's Exhibit 3 (DC – 27).] The Appellee did not account for these payments. In fact, the USF groups/Citibank record dated September 3, 1998 showed that a total of $29,770.59 was disbursed and total payments and refund received was $17,348.48. [Appellant's Exhibit 3 (DC – 31).]

APPENDIX H

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

In re:

AHMED A. OPETUBO

Bankruptcy Case No.
00-15984 DEM)

Debtor

AHMED A. OPETUBO

Plaintiff

Adv. Proceeding No.
00-1690

v.

Hon. Dennis E. Milton

CITIBANK STUDENT LOAN CORPORATION, UNITED STUDENT AID FUNDS, INC., AND EDUCATIONAL CREDIT MANAGEMENT CORPORATION

Defendants

AFFIDAVIT OF TAMARA A. TONN OF
EDUCATIONAL CREDIT MANAGEMENT CORPORATION

STATE OF MINNESOTA)

) ss:
COUNTY OF RAMSEY)

TAMARA A. TOON, being duly sworn, does hereby certify under penalties of perjury that the following facts and allegations are made on her personal knowledge:

1. I am over the age of eighteen (18) years of age, am competent to be a witness to the matters stated herein and believe the obligations of an oath.

2. I am a paralegal in the Legal Department at Educational Credit Management Corporation ("ECMC"). In this capacity, I am familiar with the records pertaining to the loan accounts of the debtor and have had occasion to become personally familiar with the matters attested to herein. The information contained in this affidavit is based on my review of the files at ECMC in my position as a paralegal and such information is attested to the best of my knowledge, information and belief.

3. ECMC is a not for profit corporation organized under the laws of Minnesota. ECMC was created under the direction of the U.S. Department of Education to provide specialized guarantor services to the Department of Education pursuant to the Federal Family Education Loan Program (:FFELP"), including transfer of title to certain student loan accounts on which the student loan borrower has filed a bankruptcy proceeding.

4. On July 28, 1992, Ahmed Opetubo (the "Debtor") consolidated separate loans with Citibank Student Loan Corporation as the consolidated lender. USA Group, Inc. guaranteed the consolidated loan as the guarantor for Citibank. Citibank, as the consolidated lender, called on the guarantee of USA Funds due to a default in accordance with the Federal Regulations. USA Funds thereafter assigned its interest in consolidated loan to ECMC as the specialized guarantor servicer to the Department of Education by assignment dated June 4, 1999. A true and correct copy of the note is attached as Exhibit A.

5. ECMC has applied the formula mandated in the Code of Federal Regulations in calculating its collection costs owed by the Debtor.

6. Collection costs are charged after a defaulted borrower has had an opportunity to contest the debt and enter into a repayment arrangement. 34 C.F.R. § 682.410(b)(5).

7. in assessing collection costs against borrowers who have defaulted on their student loan obligations, 34 C.F.R. § 682.410(b)(2) requires guaranty agencies to charge a borrower the lesser of the following:

i. The amount the same borrower would be charged for the cost of collection under formula in 34 C.F.R. § 30.60; or

ii The amount the same borrower would be charged for the cost of collection if the loan was held by U.S. Department of Education.

8. 34 C.F.R. § 30.60 provides for collection costs based on the following formula:

$$\frac{1}{1\text{-cr}}$$

where "cr" is the commission rate charged by the guaranty agency. The amount the borrower would be charged for the cost of collection if her loans were held by the U.S. Department of Education is calculated at the rate of 25% of the total principal and interest outstanding under the borrower's loan.

9. Consistent with 34 C.F.R. § 30.60(a), the commission rate is determined by dividing the costs associated with the collection of debts, which include, but are not limited to, salaries of employees performing Federal loan servicing and debt collection activities; telephone and mailing costs; costs for reporting debts to credit bureaus; costs for purchase of credit bureau reports; costs associated with computer operations and other costs associated with the maintenance of records; bank charges; collection agency costs; court cost and attorney fees; and costs charged by other government agencies.

10. The sum of these costs is divided by the total amount of debt for which an agency is acting as a guarantor. At the time collection

costs were assessed to the borrowers loan balance, ECMC's commission rate was 19.07%. thus, applying this commission rate to the formula in 34 C.F.R. § 30.60, ECMC's collection costs percentage is 23.56%, which is less than the 25% rate charged by the Department of Education.

11. Once the applicable percentage is established by using the method in the regulations, this figure is multiplied by the sum of the outstanding principal and interest on the first day of every year (principal + interest x 23.56% = collection costs).

12. For loan 1, collection charges are calculated by first adding the principal of $29,832.83 to the interest of $5,830.44 (the loan balance as of January 1, 2001), yielding a sum of $35,663.27. Next, this amount of $35,663.27 is multiplied by 23.56%, resulting in collection costs of $8,402.27 (rounded to the nearest penny).

13. Thus, the total outstanding loan amount, attached hereto as Exhibit B, includes collection costs of $8,402.27.

14. Regarding the payment of collection costs, ECMC applies borrower payments in accordance with 34 C.F.R. § 682.404(f); first to collection costs, then to interest and principal. Of any given payment, however, only a percentage of that payments toward collection costs. After the collection-costs portion has been applied, the balance of that payment is applied next to accrued interest. Any remaining amounts are then applied to principal. This method of application reflects the Department of Education's intention that collection costs not be "frontloaded," a practice the Department concluded did not accurately reflect actual expenses and discouraged repayment.

15. The total outstanding on the loan as of October 7, 2001 is $29,832.83 in principal, $7,888.73 in interest and $8,402.27 in costs for a total of $46,123.83.

16. The document attached as an exhibit hereto in the form maintained by ECMC in the normal course of its business operations.

EDUCATIONAL CREDIT
MANGEMENT CORPORATION

By: /s/ Tamara A. Tonn
Tamara A. Tonn

Subscribed and sworn to before me this 8th day of October, 2001.

/s/ Peggy A. Helms
Peggy A. Helms
Notary Public
My Commission

Expires: 1/31/05

APPENDIX I

New York City School
Construction Authority

MEMORANDUM

To: Ahmed Opetubo
From: Peter J. McGlinchy /s/ Peter J. McGlinchy
Date: January 6, 2003

As you are aware, the NYCSCA is being restructured to accommodate recent changes in the capital plan and school construction program and that you are being laid off as a result of this reorganization. Your last day on payroll will be January 24, 2003.

Beginning on January 9, 2003 facilities will be available at 110 Livingston Street, where telephones, computers and printers are being provided to assist you with your transition efforts. Please sign

in when enter the Hall of the Board on the first floor. This assistance will be available to you through January 24, 2003.

If you have questions about your on-going health benefits pension options or other managerial benefits please feel free to call either Jim Silberman (extension 8061) or Stacy Cassel (extension 8201) as they arise. There is also some information about these programs in the folder you are receiving today.

Attached is a checklist of steps required to complete the separation process. Please contact any of the Human Resource staff members if you need help completing these steps or if you have questions concerning this information.

Attachment
cc: Employee File

CHECKLIST

Accounting

Please complete and submit to Susan Moran or Diane McGhee any applicable reimbursement forms. Authorization will be handled by HR.

Financial Disclosure

If you are required to file a financial disclosure form, you must do so within **60 days** of your separation from the SCA. This form must be hand delivered or sent certified (mail/return receipt requested) to the Conflicts of Interest Board at 2 Lafayette Street, New York, NY 10007. This is necessary for you to receive any applicable lump-sum payment to which you may be entitled.

Payroll/Timekeeping

Final timesheets will be prepared by Human Resources in consultation with you.

Please be advised that direct deposit will be canceled upon your separation. Any payments that may due will be paid by check and mailed to your home via certified mail.

The following items must be returned to Susan Moran or Diane McGhee by Wednesday, January 8, 2003.

Equipment including cellular telephones, pagers, and laptop computers.

SCA vehicles, vehicle keys, vehicle logbook, and agency parking permit.

SCA identification card.

If you have any questions, please don't hesitate to contact HR at:

Louise Nicolazzi-Shapiro	Ext. 8215
Susan Moran	Ext. 8066
Diane McGhee	Ext. 8063
Jim Silberman	Ext. 8061
Stacy Cassel	Ext. 8201

APPENDIX J

Information from Certificate of Marriage:

Federal Republic of Nigeria; FORM E-FIRST SCHEDULE
The Marriage Act Section 24
No. 139-2001
Marriage Celebrated in the Eti-Osa Marriage Registry at Ikoyi in Nigeria.

Date:	8th November 2001
Name of Husband:	Ahmed A. Opetubo
Name of Wife:	Morenike B. Opetubo
Witnesses:	Engr. Rufai Ademola & Ronke Akinlusi
When Married:	8th November 2001
Names and Surnames:	Ahmed Adio Opetubo; Morenike Busurat Quadri
Full age or Minor:	52 yrs; 37yrs.

Condition:	Divorcee; Spinster
Rank or Profession:	Accountant; Business
Residence at time of marriage:	15 Ajasa Street, Ikeja-Lagos; 18A Femi Okunnu Estate-Loki-Lagos
Father's Name and Surname:	Awesu Opetubo; Abdul Wahab Quadri
Occupation, Rank of Profession of Father:	Late; Late

Married at Marriage Registry-Etui Rosa Local Government by (of before) me:

/s/ D.O. George (Mrs)
Minister (or Registrar as the case may be)

This marriage was celebrated between us:

/s/ Ahmed A. Opetubo
/s/ Morenike B. Quadri

In the presence of us:

/s/ Rufai Ademola
/s/ Ronke Akinlusi

APPENDIX K

Statement of Monthly Income and Expenses
Unemployment Benefits

Expenses:

Child Support	*
Rent	850.00
Pension Loan	410.00
Utilities	86.00
Job Hunting	25.00
Telephone	32.00
Mobile Phone	20.00

Master Card	24.00
Visa	52.00
American Express	240.00**
Food	250.00
Medical	***
Dental & Vision Care	***
Transportation	200.00
Auto insurance	95.00
Apartment insurance	17.00
Clothing	75.00
Dry Cleaning/Laundry	30.00
Religion	50.00
Miscellaneous	100.00***
Children Summer Camp	*
Cable	21.00
Total Expenses	
Available after expenses	

Note: (1) => The unemployment benefit rate of $364.50 weekly was prora
over 12 months to arrived at the estimated monthly amount.

* The amount to be determine by the Bronx County Supreme Court

** It includes Internet payment of $9.99 per month.

*** The cost is $639, which represents 102% of my previous employ
(See pages 1 and 2 of Exhibit 10.)

**** The monthly premium is $92 (See page 3 of Exhibit 10)

***** Job hunting, computer supplies, toiletries, medications etc.

APPENDIX L

1. NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY

MEMORANDUM

To:	Department SCA Employee
From:	Jim Silberman /s/ Jim Silberman Manager, Benefits and Pensions
Re:	Cobra and Certificate of Group Health Plan Coverage
Date:	Jan. 6, 2003

Under COBRA, an employee terminating employment with the SCA is eligible to continue health insurance and welfare and benefits for him/herself and eligible dependents for up to 18 months from the date of termination at a premium equal to 102% of the SCA group rate.

If you wish to continue your health insurance benefits under COBRA, please complete the enclosed application and mail it directly to your health insurance carrier within 60 days of your termination date. To continue your welfare fund benefits at an additional charge, contact your welfare fund administrator directly.

I have also provided you with a Certificate of Group Health Plan Coverage pursuant to the Health Insurance Portability and Accountability Act.

If you have questions regarding the above please call me at (718) 472-8061.

I have been advised of my rights under COBRA, received a COBRA form and a Certificate of Group Health Plan Coverage:

AHMED A. OPETUBO /s/
Ahmed A. Opetubo 1/6/03
Print Employee Name

2. **COBRA** 7/1/02

Table showing monthly rates effective July1, 2002 for different health insurance providers was omitted in printing

UNDER THE federal Consolidated Omnibus budget Reconciliation Act (COBRA), you have the opportunity to continue health benefits coverage through the City of New York group.

You are responsible for paying the full premium for your plan and coverage. The premium levels included in this pamphlet reflect 102% of the current rate (because these rates are subject to change, you should check with the plan to determine the premium at the time of your COBRA enrollment). Payments may be made monthly on the first of the month. There is usually a 30 day grace period. The City will not "carve out" benefits provided through your Welfare Fund that are similar to those available in your plan's Optional Rider. If you decide to purchase the Optional Rider, you must pay for the entire Optional Rider offered by your chosen plan. If you decide to purchase any of your Welfare Fund benefits, you should contact the welfare Fund to determine what benefits are available, and the associated cost.

OFFICE OF LABOR RELATIONS
MANAGEMENT BENEFIT FUNDS
40 Rector Street, Third Floor,
New York, NY 10006
Tel: (212) 306-7290 TTY: (212) 306-7629 Fax: (212) 306-7353
nyc.gov/html/olr

JAMES F. HANLEY
Commissioner
PAMELA S. SILVERBLAT
First Deputy Commissioner

DOROTHY A. WOLFE
Director, Employee Benefit Program
GEORGETTE GESTELY
Fund Director

You have the option to continue coverage of some or all of the Fund's Health Benefit Plans under the provisions of the Consolidated Omnibus Budget Reconciliation Act (Public Law 99-2721, Title X), also know as COBRA. These options are:

1. If you elect COBRA continuation in a City Health Plan, you may also elect continuation in the Fund's Health Benefits below, at the monthly premium specified.

Benefits	Individual	Family
Superimposed Major Medical	$11.49	$30.70
Dental & Vision Care	$43.28	$91.63
Superimposed Major Medical, Dental & Vision Care	$54.77	$122.33

2. If you do not elect COBRA continuation in a City Health Plan, you may elect continuation in the Fund's Superimposed Major Medical Plan at the rates specified above, but you cannot elect continuation in the Fund's Dental and Vision Care Plans.

These rates will remain in effect until June 30, 2003. Please include a copy of the City of New York COBRA election form, which was sent to your City Health Insurance Carrier with the enclosed completed application form.

Please refer to the following page for the maximum continuation period entitlement for which you and/or your eligible dependents are eligible for coverage under COBRA.

Please send your completed COBRA application to the following address for processing:

City of New York
Management Benefits Fund
40 Rector Street, 3rd Floor
New York, NY 10006
Attention: COBRA Unit

Please do not send any premium payment with your COBRA application. You will receive a bill from Empire Blue Cross Blue Shield, the Fund's COBRA Administrator.

APPENDIX M

NORTH CAROLINA AGRICULTURAL AND TECHNICAL STATE UNIVERSITY

Division of Academic Affairs
Office of Admissions
B.C. Webb (Lower Hall)

November 27, 2001

Dear Ms. Opetubo:

On behalf of the students, faculty, and staff of North Carolina A & T State University, I am pleased to inform you that your application for admission has been approved for the **Fall 2002** class. Your Certificate of Admission is enclosed. If this data is incorrect, please call this to our attention immediately.

Please note that this offer is subject to all conditions as stated on the attached Certificate of Admission. Students graduating from high school since May 1990 must have completed the Minimum Admission Requirements for freshmen as required by the University

of North Carolina System and is contingent upon the successful completion of all senior year courses. Transfer students are admitted on the condition that their cumulative Grade Point Average is 2.0 or better on a 4.0 point scale at the completion of the last term. Transfer evaluations will be sent under separate cover once they are completed. All students are required to request that their final high school/college transcripts be forwarded to the Office of Admissions.

To confirm this offer of admission, please complete and return the enclosed card immediately. Should your plans change before the opening of the semester, you need only to notify us of your decision to enroll elsewhere.

On the reverse side of this letter, please find information relative to Orientation, fees housing, financial aid, and health services. Please read this information carefully.

If you have any questions about your admission status, please contact the Office Admissions. We wish you every success in your studies with us, and we ook forward to your arrival on the campus.

Sincerely yours,
/s/ Harry Lee Williams
Interim Director of Admissions

APPENDIX N

Direct Loans
U S Department of Education
P O Box 9003
Niagra Falls NY, 14302-9003
William D. Ford Federal Direct Loan Program

Disclosure Statement
William D. Ford Federal Direct Loan Program

Direct Subsidized Loan
Direct Unsubsidized Loan

1. Borrower Information:
   Name and Address: Opetubo, Adenike E, 3237 Hering Ave, Bronx, NY 10469
2. Date of Disclosure Statement: 08/20/2002
3. Area Code/Telephone Number: (718) 515-8369
4. School Information – School Name and Address:
   North Carolina Agricultural And Technical State University
   1601 East Market Street, Greensboro, NC 27411-001
5. School Code/Branch: G02905
6. Loan Information: Loan identification Number(s):
   123687850U03G02905101
7. Loan Period(s): 08/19/2002 – 05/09/2003
8. Loan Fee%: 3.000%
9. Information about the loan(s) that your school plans to disburse (pay out) follows:

This information is explained in detail on the back. The actual disbursement dates and amounts may be different than the dates and amounts shown below. Your school and the Direct Loan Servicing Center will notify you of the actual disbursement dates and amounts.

Direct Unsubsidized Loan:

Gross Loan Amount - Loan Fee Amount + Interest Rebate Amount = Net Loan Amount

$2625 - $78.00 + $40.00 = $2587.00

Your School Plans to disburse the Net Loan Amount as follows:

(Variable Interest Rate)

Date	Net Disbursement
09/19/2002	$1294.00
01/03/2003	$1293.00

APPENDIX O

LIST OF EXPENSES

(These information were taken from the actual bill of sales/receipts)

1. Best Buy Store # 155, Greensboro, NC, 27407 (336) 297-1242; **$199 & 41.50**
2. LOWE'S , Greensboro, NC, 27407 (336) 292-4813 ; **$31.91 & $32.86**
3. WAL*MART,Greensboro, NC 27409 (336) 292-5070; **$49.00**
4. The Fidelity Bank, Greensboro, NC (800) 816-9608; **$101.50**
5. Holiday Inn Express, Greensboro, NC 27405, (336) 697-4000; **$128.44**
6. Alamo Car Rental, New York, NY; **$365.79**

APPENDIX P

LIST OF JOB SEARCH

(These information were extracted from the job posting/ recruiter's response)

1. January 07, 2003; Recruitment Specialist Human Resources, 1 Liberty Plaza, NY 10006. (212) 858 4703, (212) 858- 4022 fax; frances.russell@NASD.com

2. January 2003; City of New York Department of Health and Mental Hygiene, 125 Worth Street, Room 908, New York, NY 10013; JVN: #816-03-09196-GSW
Associate Staff Analyst, Grant Manager, Division of Financial & Strategic Management/Office of Grants management; Salary $50,847 - $70,549.

3. January 2003; City of New York Department of Health and Mental Hygiene, 125 Worth Street, Room 908, New York, NY 10013; JVN: #816-03-6874-GSW
Associate Staff Analyst, Assistant to the Director, Division of Health Promotion & Disease Prevention/Family Health; Salary $50,847 - $70,549.

4. January 2003; City of New York Department of Health and Mental Hygiene, 125 Worth Street, Room 908, New York, NY 10013; JVN: #816-03-6873-GSW
Staff Analyst, Contracts and Fiscal Analyst, Division of Health Promotion & Disease Prevention/Family Health; Salary $44,983 - $53,681.

5. January 2003; City of New York Department of Health and Mental Hygiene, 95 Worth Street, New York, NY 10013; JVN: #816-03-020MH

Associate Staff Analyst, Assistant to the Director, Office of Program Review and Evaluation; Salary $50,847 - $70,549.

APPENDIX Q

1.

Statement of Monthly Income and Expenses		
Salary/Wages		$3,218.00*
Expenses:		
Child Support	$1,504.00	
Rent	850.00	
Pension Loan	101.00	
Utilities	86.00	
Telephone	57.00	
Internet	27.00	
Mobile Phone	43.00	
Master Card	24.00	
Visa	35.00	
American Express	240.00	
Food	250.00	
Medical	30.00	
Transportation	260.00	
Auto insurance	95.00	
Apartment insurance	20.00	
Clothing	75.00	
Dry Cleaning	30.00	
Religion	50.00	
Miscellaneous	100.00	
Children Summer Camp	250.00	
Cable	21.00	

BEST AVAILABLE COPY

Total Expenses	$4,148.00
Available after expenses	($930.00)

Notes: * Net available monthly take home pay.

As of December 31, 2000, I owed $7,500 in legal fees for an ongo
(I have not make any payment on the amount.)

2. EARNINGS STATEMENT

New York City School Construction Authority
IDCNY – CENTER 1
30-30 Thomson Avenue
Long Island City, NY 11101

AHMED A. OPETUBO
398 LEXINGTON AVE
BROOKLYN, NY 11216
Period Ending 08/25/2001; Pay Date 08/32/2001
Social Security Number: 100-64-1767
Taxable Marital Status: Married
Exemptions/Allowances:
Federal 4; State 4; Local 4

Earnings:	
Gross Pay	$2,682.04
Deductions:	
Statutory	
Federal Income Tax	231.09
Social Security Tax	155.60
Medicare Tax	36.39
NY State Income Tax	124.90
New York Cit Income Tax	69.33

Other	
Checking	691.34
Credit Union	100.00
Garnishment	694.00
Gul Opt Life	30.92
Irc 125 Medical	172.41*
Pension Loan	101.27
414H Reg Pen	80.45*
457 Def Comp	194.33*

*Excluded from federal taxable wages
Your federal taxable wages this period are $2,234.84

APPENDIX R

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 18

----------X

AFUA AFRIYE OPETUBO, a/k/a/
DECISION/ORDER
AFUA AFRIYE FULLWOOD
Index No. 5071/96

Plaintiff.

-against-

AHMED A. OPETUBO

Defendant.

----------X

Recitation, as required by CPLR 2219[a], of the papers considered in the review of this motion:

PAPERS	NUMBERED
Notice of Motion and Affidavits Annexed	
Order to Show Cause and Affidavits Annexed.....	1, 2
Answering Affidavits and Cross-Motion.....	3
Replying Affidavits.....	4
Exhibits.....	5 – 11

MARTIN, L.

Upon the foregoing cited papers, the Decision/Order of this Motion is as follows:

Defendant, pro se, makes this post-judgment application for downward modification of his child support obligation. He also moved for an order directing the plaintiff to provide health insurance for the parties' children, a refund for overpayment of child support, and an order directing the plaintiff to promptly report any modification of the child support to the Support Enforcement Unit. The defendant indicated that he was laid off on January 6, 2003 and began receiving unemployment benefits in the gross amount of $405.00 per week as of the week of January 27, 2003. He also indicated that his health plan was terminated as of January 24, 2003. He argued that his basic child support obligation and his share of the add-on expenses should be reviewed in light of his decrease income. The defendant further noted that the parties' Stipulation Agreement provides that any refund that is due from the plaintiff should be paid within 30 days.

The plaintiff opposed the defendant's application for a downward modification of the child support and argued that the documentation submitted by the defendant is inadequate to warrant such relief. She claimed that the defendant is a certified public accountant who has significant income from his private clients who are not related to his employer. She also claimed that a significant

amount of defendant's income paid to him by his prior employer was in the form of deferred compensation. She suggested that the defendant's deferred income should be available to him and should be used to make the required child support payments. The defendant in his reply affidavit denied the plaintiff's claim that he has private clients and earns additional income. He asserted that his only source of income is from unemployment insurance.

It has been well settled that the court will not disturb the support provisions of an agreement absent a showing of a substantial, unanticipated and unreasonable change in circumstances of the defendant's support obligation. Boden v. Boden, 42 N.Y. .2d 210 (1977); ruggerio v. Ruggerio, 173 A.D. .2d 595 (2nd Dept. 1991). In the light of the conflicting affidavits herein, a hearing is required to determine whether the defendant is entitled to a downward modification of his child support obligation. Accordingly, the parties are hereby directed to appear before Special Referee John Ostermann on December 1, 2003 at 10:00 a.m. The Special Referee shall also make recommendations on the defendant's applications for an order directing the plaintiff to provide health insurance for the parties' children, and the refund of overpayment of child support, if any, due to the defendant.

This shall constitute the decision and order of the Court.
Dated: July 16, 2003
So Ordered:

/s/ J.S.C.
J.S.C.

APPENDIX S

1.

Board of Education Retirement System
of the City of New York
65 Court Street
Brooklyn, New York 11201-4965

Horatio Sparkers
Executive Director

Denise Ellis
Deputy
Executive Director

Date: 01/05/2001

Membership
Number: 00G531769

Social Security
Number: 100-64-1767

A. OPETUBO
398 LEXINGTON AVENUE
BROOKLYN., NY 11216-0000

Dear A. OPETUBO,

Please be advised that your application for a QPP loan from your Qualified Pension Plan account has been approved. A check for the loan amount will be mailed to you from the Office of the Comptroller. The following details are provided for your information:

1/12/2001	Date of Loan
7.00%	Interest Rate
0.30%	Insurance Rate
$358.89	Outstanding Loan balance (old loan)
$4,540.00	Amount of Loan Granted

$4,500.00	Net Check (Less Administrative Service Charge)
$40.00	Administrative Service Charge
$6.14	Interest and/or Insurance Charges to First Payment
$4,905.00	New Outstanding Loan Balance
$101.27	Installment Payment Amount
52	Number of Installments
2/2/2001	Date First Payment is Due
1/17/2003	Date last Payment is Due
1/12/2002	Date Next Eligible for a Loan

If deductions from your paycheck do not begin on the date indicated above, please contact this office immediately at (718) 935-2317. Continuity of loan repayments is essential, since a defaulted loan can result in serious income tax liability.

Please retain this statement for your permanent records.

Denise Ellis

2.

Board of Education Retirement System
of the City of New York
65 Court Street
Brooklyn, New York 11201-4965

Horatio Sparkers
Executive Director

Salwa Ali
Deputy Executive Director

Date: 03/08/1999

Membership Number: 00G531769
Social Security Number: 100-64-1767

A. OPETUBO
398 LEXINGTON AVENUE
BROOKLYN., NY 11216-0000

Dear A. OPETUBO,

Please be advised that your application for a QPP loan from your Qualified Pension Plan account has been approved. A check for the loan amount will be mailed to you from the Office of the Comptroller. The following details are provided for your information:

3/12/1999	Date of Loan
7.75%	Interest Rate
0.30%	Insurance Rate
$0.00	Outstanding Loan balance (old loan)
$4,040.00	Amount of Loan Granted
$4,000.00	Net Check (Less Administrative Service Charge)
$40.00	Administrative Service Charge
$6.00	Interest and/or Insurance Charges to First Payment
$4,046.03	New Outstanding Loan Balance
$84.11	Installment Payment Amount
52	Number of Installments
4/2/1999	Date First Payment is Due
3/16/2001	Date last Payment is Due
3/12/2000	Date Next Eligible for a Loan

If deductions from your paycheck do not begin on the date indicated above, please contact this office immediately at (718) 935-2317. Continuity of loan repayments is essential, since a defaulted loan can result in serious income tax liability.

Please retain this statement for your permanent records.

Loan Department

3. **Credit Cards Expenses (Visa and American Express):**

Auto Repairs:

P & A Auto Service Inc., 38-09 24 Street L.I.C. NY 11101
5/21/2001 **$300**
M & D Tire Repair Sales, 1967 Atlantic Ave, Bklyn, NY 11233
06/24/2001 **$405.94**

Food and Household Materials:

Costco Wholesale, Brooklyn, NY **$64.53**
$106.54
1/03/2002 **$39.14**
1/24/2002 **$51.64**
1/24/2002 **$32.16**
2/13/2002 **$50.89**

The Home Depot, Brooklyn, NY:

2/15/2002 **$24.83**

Conway Store, Fulton Street, Brooklyn, NY:

APPENDIX T

TRANSCRIPT – BANKRUPTCY COURT BENCH TRIAL

OPETUBO-CROSS-DENTON

(The lines and corresponding numbers referenced herein for each page of the transcript was omitted in printing. **Q** represents question from the Defendant and **A** is response or answer from the Plaintiff).

Page 28 (lines 12-20), Page 29 (lines 16-25) and Page 30 (lines 2-25) – **Q**. When did you stop being a cab driver and start working in your profession; the management auditing accounting profession. **A**. I started employment with the City of New York in August 20, 1985. **Q**. 1985? **A**. 1985. I did not stop driving a cab until December 1989. **Q**. So you started working for the city upon the completion of your studies at The New School for Social Research? **A**. Yes, that is correct. **Q**. And that was after you received your MPS in management auditing? **A**. That's correct. **Q**. What was the first job that you held in 1985? I know you have been the audit manager from 1990 to the present but prior to that time, what was your position with the New York City? **A**. My job was an entry-level job as an auditor. **Q**. As an auditor? **A**. Yes. An entry-level job as an auditor. **Q**. Do you remember how much you made at that time? **A**. About $18,000 then. **Q**. Could you have obtained the entry-level job as an auditor without your MPS degree in management auditing? **A**. Yes. **Q**. Did it help --. **A**. Because I was told that you are over qualified, so why are you looking for this job? I have to persuade the individual that hired me that with my MPS, you know, it would be able to help me do a better job than just an ordinary bachelors degree because I'm looking far ahead. Lord be hold, he offered me the position. **Q**. Did you move from entry-level job as an auditor to an audit manager? **A**. No. **Q**. What did you do

after the entry-level job as an auditor? **A**. I was hired in August of 1985 by New York City. I worked for the comptroller's office. C-O-M-P-T-R-O-L-L-E-R. **Q**. When was that? **A**. I was hired in1985. **Q**. In 1985? **A**. Right. **Q**. So an auditor in the comptroller's office? **A**. As a management auditor trainee. **Q**. Is that an entry-level job? **A**. Yes, that's an entry-level job. **Q**. You decided at some point, since that was 1985, you decided to go to Long Island University and your MBA in accounting, correct? I believe that was in 1987. **A**. Yes, it was 1987 that I went to Long Island University.

Page 19 (lines 3-22) and Page 20 (lines 2-3) – THE WITNESS: …In the light, as I have said my current salary, minus expenses will leave me with a negative of $930. That will not allow me to maintain a minimum standard of living. I believe I have met one of the -- the first prong of the Brunner test. THE COURT: Mr. Opetubo, what are the specific components of your income and what are the specific monthly expenses that you have? Where are those set forth in your exhibits? MS. DENTON: Your Honor, I think it's Exhibit 6 and Exhibit 13. THE COURT: Counsel, I was trying to direct the defendant's testimony. THE WITNESS: Your Honor, it's Exhibit 6. THE COURT: Exhibit 6 appears to list--. THE WITNESS: It's the plaintiff's. THE WITNESS: Exhibit 13 has something to do with my wages. As I said, my total monthly expenses are $4,148. That would leave me with a balance of $930 a month which is a negative balance.

Page 53 (lines 19-25), Page 54 (lines 2-25) and Page 55 (lines 2-25) – …I would like to talk briefly with you about your current expenditures. I think the easiest way to do that is to just go over and compare some of the exhibits that are before the Court. In particular, we are going to be looking at Exhibit B which is your pay stub for the period of April 21, 2000. Ms. DENTON: Your Honor, I believe this is an exhibit to his interrogatory responses. THE COURT: What is the date of the pay stub? MS. DENTON: The date at the top is period ending 4/21/01. THE COURT: On Exhibit C of your exhibits there is a pay stub which appears to be dated August 31, 2001. MS. DENTON: Your Honor, we can work from that because it's probably going to be easiest for purposes of allowing us

to go through it. THE COURT: Do you see that, Mr. Opetubo? THE WITNESS: Yes. THE COURT: The August 2001 pay stub? THE WITNESS: Yes. THE COURT: Ms. Denton, do you have that on hand? MS.DENTON: Yes, your Honor, I do. BY MS, DENTON: **Q.** Mr. Opetubo, I would like to go through your pay stub with you a little bit. You have that in front of you. **A.** Okay. **Q.** it shows that you receive a gross pay of 2682.04, is that twice a month? **A.** Yes, biweekly. **Q.** So every two weeks? **A.** Yes. **Q.** There four entries for the different types of taxes that are taken out on a weekly basis or a biweekly basis. **A.** Five. **Q.** Five. And I assume that there is not too much you can do about trying to reduce those, correct. **A.** No, there is nothing I can do about that. That is a statutory requirement. **Q.** I think we are all, unfortunately, subject to the same five. If you total all of those taxes, my figures show those taxes totaling $617.31. Are you with me on that? **A.** Yes. I don't have my calculator with me.

Pages 56, 57 and 58 (lines 2-25) - **Q.** Can I assume that you will take my word for it subject to corrections if I'm wrong later on? **A.** Yes. THE COURT: What was that number, again, counsel? MS. DENTON: 617.31. THE COURT: Thank you. MS DENTON: I just did it twice and it seems to work. **Q.** If you take 617.31 and you subtract it from your gross pay of 2682.04, you get your net gross pay, less taxes. I'm showing a total in the regard of 2682.04. In reality, after taxes we have 2682.04 to work with? **A.** No. THE COURT: Is it 2064 after taxes? MS. DENTON 2682.04 after taxes. THE WITNESS: That's before my taxes. The gross is 2682.04 and then you have to subtract those five taxes of that amount of 6 something from--MS. DENTON: I'm sorry. You're right. THE WITNESS: It comes out to 2,00 and some change. BY MS. DENTON: **Q.** You end up with 2064.73. Now, I would like to go through just a couple of these entries before we start taking deductions from that figure, if I can. The first entry that I would like to look at is--it's actually three entries. One says 414H reg pen and the other says 457 Def Comp and there is a Non 414H Arr which doesn't have any amount. Can you tell me what the 414 reg pens means? **A.** that's regular pension. **Q.** What is that? Is that money

that you contribute to your own pension? **A.** Yes. **Q.** Is that voluntary on your part? **A.** The pension, yes. **Q.** How long have you been contributing to that pension? **A.** I didn't start a pension until my divorce started. That was--I joined the pension on October of 1996. **Q.** So is it safe to assume that you started adding to your pension right about the time you stopped paying your student loans? **A.** No. I joined the pension plan--I started to be in the pension plan in 1996. **Q.** When was your last student payment? **A.** It was around probably June. THE COURT: I believe the record indicates July of '97. THE WITNESS: Yes July. **Q.** So about a year later you were doing both, you were making your pension payments then, at that time you joined it, and you were paying your student loans for approximately a year? **A.** Yes **Q.** Have you been continuous in your contributions to your pension plan? **A.** Yes. **Q.** So at some point you stopped your student loans but you still continued to pay contributions to your pension plan, correct? **A.** Yes.

Page 59 – **Q.** Underneath that there is an entry that says 457 Def Comp, can you tell me what that is? **A.** That's a deferred compensation plan. **Q.** Can you explain that for me? **A.** Well it's I.R.S. Code 457.

Q. Okay. **A.** Which I cannot explain because--my lay understanding of it was that during the President Bush Administration, not W. Bush, they were trying to reduce the deficit of the federal government. There were a lot of city, local and state employees that were not paying social security because they didn't join the pension plan. **Q.** Okay. **A.** So they wanted to go tax them and so you have to pay taxes regardless of pension or no pension, but the I.R.S. code is there. Mayor Dinkins was there during that time. So 457--okay. You can contribute to 457 so at the end it's like you earn so when you retire you can start collecting from it. It is not a regular city pension or state pension.

Pages 60, 61, 62, 63, and 64 (lines 2-25) - **Q.** Is that your money that goes into it? **A.** Yes. It's that you are allowed to contribute. I believe the maximum is 8 percent of your annual income into that plan. **Q.** Do you have to contribute? **A.** No it's an option. You don't have to. **Q.** It's an option? **A.** Yes. **Q.** You get

certain tax benefits so it's good to contribute so you can get tax benefits from it later on when the money is drawn out? **A.** Right. And in the meantime-- **Q.** It reduces the amount of your taxable income compensation? **A.** Right. And at the same time you're contributing to Social Security. And if you did not join this pension then it's just like you're giving your money away. **Q.** But you are still contributing to Social Security up top? **A.** Yeah. When I joined the pension that money comes back to you. If you did not join this plan, the Social Security you pay will never come to you because you did not join the compensation plan. **Q.** But it is an election **A.** Yeah. **Q.** You don't have to do it? **A.** No, you don't have to do it. **Q.** You can stop doing it tomorrow if you decided that you needed that extra $200 per pay period, $400 per month? **A.** No. This is not $200. Q I'm sorry. Is that taken out twice a month, every pay period? **A.** Yes. **Q.** So let's take 194 times 2. That's approximately $388. If you decided you needed that $388 for something, you could choose to not put it into the deferred compensation, correct? **A.** If I choose to do that then during my retirement. What do I live on? **Q.** Understood. Okay. The pension, again, if you decided that you needed the $160 that you are contributing a month to your pension, you could choose to not contribute to that fund, correct. **A.** It's a choice that I can make. **Q.** understood. You're saving for your retirement, correct? **A.** Yes. Q So you can have something more addition to Social Security, correct? **A.** Yes. **Q.** we took care of those two entries. Now, there is pension loan entry of 101.27, can you tell me what that relates to, Mr. Opetubo? **A.** Yes. The pension loan is a loan that I take to support myself, to augment my income. I use it to pay some of my rent up front because now I still owe my landlord maybe two months rent. I took the money out, I paid that off, I got that off my back. I have a roof to go into and everything now. I do not have to worry about that so I can concentrate on my job. **Q.** I just want to backtrack real quick. You had indicated in the 457 you are allowed to contribute up to 8 percent, correct? **A.** Yes, up to 8 percent of your annual income. **Q.** Do you know what percentage you contribute? **A.** I believe I contribute 8 percent also. **Q.** 8 percent? **A.** Yes. **Q.** So you chose to contribute the maximum?

A. Yes. **Q.** Now, back to the pension loan. Now, this is a loan that -- when was it taken out? **A.** This loan was taken out -- I think it's in Exhibit 10. This loan was January 12, 2001. but before that there was a prior loan dated March 12, 1999. **Q.** This pension loan deduction, is that 101.27 twice a month? Each pay period they take out 100? **A.** Yes. **Q.** So that's approximately $200 a month, correct? **A.** Yes. **Q.** Now, the pension loan, that is going to expire at some point. I think if you look at that exhibit, I see the last payment is January of 2003, correct. **A.** Yes, January 2003. **Q.** So at that time $202 per month will be freed up, correct? **A.** No It's not going to be freed up. **Q.** Is the pension loan going to be paid? **A.** It will be paid but I'm going to get another one to just pay my rent. That is how I plan to use that. **Q.** What is the interest rate that you pay on your pension loan, do you know? **A.** It's right here. 7 percent **Q.** 7 percent? **A.** Yes. And there is a insurance rate of .30 percent. **Q.** Again, you chose to take out that pension loan? **A.** Yes. I have to take it out otherwise I'm going to be on the street. **Q.** Now, there are two entries above the pension loan. One is for medical in the amount of 172.41. Is that per pay period?

Page 65 to Page 67 (line 25) - **A.** Yes. **Q.** So approximately 344 comes out a month. I assume that is for your medical and your medical insurance? **A.** Yes, medical insurance that covers me and my kids. **Q.** You and your kids? **A.** Yes. **Q.** How is your coverage? Do you have to pay co-payments or anything along those lines? **A.** Only $10 co-pay per visit. **Q.** What about prescriptions and things like that? **A.** Yes. **Q.** It covers that? **A.**$10 **Q.** Is there anyone on the plan other than you and your daughters? **A.** No. **Q.** Above that entry is something that says Gul Opt Life of 30.92. Can you tell me what that refers to? **A.** That is life insurance. **Q.** Is that life insurance that you pay for? **A.** Yes **Q.** What is the amount of that life insurance? **A.** What do you mean "the amount"? **Q.** God forbid something happens to you, what amount would the beneficiary receive? Is it term life, whole life? **A.** I get confused with term life and whole life. This has a cash value. I don't know if it's whole life or term life. It has a value of -- it was in accordance with the divorce. It was a supplemental agreement that I was required to take life insurance for

at least $200,000 but I can't afford it so I settled for $150,000. **Q.** So that's $150,000. **A.** Right. **Q.** And that's pursuant to the divorce decree? **A.** Yes, pursuant to the divorce decree. Q And there is an entry above that for a garnishment. Now, you've previously testified that one of the reasons why you're in this mess is the fact that you've got these child support obligations pursuant to the divorce decree. **A.** Yes. **Q.** And it's 694 times 2, approximately $1388 per month? **A.** No **Q.** What is it monthly? I know we've talked about this a little bit. **A.** Monthly is 1,500 and something. **Q.** 1,504 I think is what you have in Exhibit 6, correct? **A.** That's right. **Q.** Let's, just for purposes of trying to get even numbers here, assume that that garnishment is approximately 750 just to keep us in round numbers. **A.** Right. Okay. **Q.** So that would be 750 for your child support obligation. Now above that entry is a Credit Union deduction of $100. Can you tell me what that is? **A.** It's like I have – **Q.** A savings account **A.** Yes, it's a savings account.

Page 68 to Page 70 (line 22) - **Q.** Do they take $100 out? **A.** Every pay period. **Q.** So $200 a month goes to your Credit Union? **A.** Right **Q.** How much is in your Credit Union account, do you know? **A.** Now I think it's about $400. **Q.** And you presumably go to that account to withdraw money as needed? **A.** Yes. Yes. **Q.** And above that is a contribution for your checking in the amount of 691.34 which, basically, after everything that we've just talked about is deducted, that's what goes into your checking account, correct? **A.** Yes. **Q.** I would like you to just bear with me for a minute, Mr. Opetubo, in my calculations. I know you won't necessarily agree with the way I describe something. We've previously talked about your gross pay of 2682.04 and from that amount we've deducted 617.31 which is all taxes that you have to pay on the top part of the statutory section of your deductions. **A.** Okay. **Q.** And we ended up with a figure 2064.73. Now, from that if we subtract your medical insurance which is required pursuant to the divorce decree, and if we subtract your garnishment which we will assume is 750 just to keep us within a monthly cycle, but we don't deduct the pension loan because that something that you list on your expenses so that is going to come out the other way so we won't

deduct that right now. We'll deduct the life insurance because that's pursuant to your divorce decree. So if we add those three items, the medical, the child support, and your life insurance, I end up with a total of 953.33. If you subtract that from 2064.73 we end up with 111.40 not including obviously your deductions for --. **A.** It's 1,111. Not 100. **Q.** Right, 1,111. Excuse me. That does not include your voluntary contributions for deferred comp and your pension and your Credit Union Savings. If we take that number and multiply that by 2 --. **A.** 2,222.80 **Q.** Okay. So if we take that number, just taking mandatory deductions, that is what you come up with at the end of a two week pay period, correct? **A.** No. **Q.** Assuming my deductions and not your contributions, correct? **A.** But the 1,111.40 is biweekly already. **Q.** So if I asked you to multiply that by 2 because you get paid twice a month--. **A.** Right. It will be 2,222.80. **Q.** Correct. THE COURT: So that represents the monthly amount. THE WITNESS: Yes. **Q.** At the end of year it's always a little bit off but for our purposes I'm comfortable with that. **A.** Okay

Pages 80 (lines 12-25), – **Q.** Now, there is an entry for internet, correct? **A.** Yes. **Q.** I didn't see that on your initial petition but assume it was wrapped up into something else. That's okay, Mr. Opetubo. It's not a big deal. Your internet, tell me what that relates to. **A.** Internet is what I use. I sometimes use AOL. **Q.** Do you have internet access at the office? **A.** Yes, but for office use only because you are monitored.

Pages 81, 82 (lines 2- 25) and Page 83 (lines 2-21) **Q.** Have I e-mailed you at your office? **A.** Yes. **Q.** That's technically not considered office use only, correct? **A.** Before I have to get permission that I'm going to receive something from so and so. Before I can give anyone out, I have to justify what is it for. **Q.** Do you know if there is internet access available at any of the public libraries? Have you ever been in a public library? **A.** Yes, I'm aware of it. **Q.** Have you ever used the internet there? **A.** No. **Q.** There is a mobile phone entry of $43. Can you tell me what that relates to? **A.** That's the cellular phone that I have. **Q.** Is there something wrong with the pay phones? **A.** Yes. **Q.** What is that? **A.** In a sense that – I obtained the cellular phone after my divorce because my kids can

contact me if they wanted to get in touch with me if something happens. Like, I'll give you an instance. About three weeks ago, my older daughter have to go out of the house and call me because I was not in the house because the stepfather is having a problem with my younger daughter. She just wanted to let me know. I was not in the house and she was able to reach on the cellular phone. And I had to go to the Bronx. **Q.** Do you use that phone for any other purpose other than speaking with your daughters? **A.** Well, the phone is only--well, for my daughters. Then in order to use the minimum usage number, I use it to sometimes call friends or to call anybody. **Q.** You could calls friends from other phones, correct? **A.** Yes **Q.** Do you know if there are any programs that are less than $43 a month? **A.** Well, because I do not have good credit, only Sprint will offer me without--which I have to pay a deposit. They all run a credit check. **Q.** Do you have a beeper? **A.** No. **Q.** Have you considered a beeper to allow your children to have immediate access to you? **A.** I have tried that but it doesn't work. **Q.** when did you try it? **A.** 1996 or '97. **Q.** What was the problem with that? **A.** The problem is when they beep me, right, and then I cannot get in touch with them, I somehow just forget about it. **Q.** You forget about it? **A.** I forget to call them back because when I received a beep from them, I say when I get to the phone I will call them but I forget. **Q.** I understand.

Page 83 (line 25), Page 84 (Line 2-25) and Page 85 (line 2-8) – Now, we have food in the amount 4250 a month for you. That seems like a lot of money to me. Can you tell me a little bit about how you shop and where you shop. **A.** Well, food includes lunch money at work. **Q.** Can you bring your lunch to work? **A.** No. **Q.** They don't allow you to. **A.** They allow you to. **Q.** You choose not to? **A.** It's not that I choose not to, but it's convenient to buy it, you know. **Q.** Can't you brown bag a lunch? **A.** And at the same time being in my position as a district manager, occasionally they will say let's go to lunch. You know, play office politics. **Q.** So you won't get a raise? **A.** You get a better evaluation. **Q.** That requires you go out to eat lunch everyday? **A.** Not everyday but at least twice a week. **Q.** Do you go out to dinner? **A.** Rarely, **Q.** Do you eat

breakfast at home or do you eat that out as well? **A.** No. I don't eat breakfast at home. **Q.** You eat that out as well? **A.** Yeah. It's only $1 for a bagel and tea. That's it.

Pages 86 (lines 5-25) – **Q.** Now, I see a transportation charge of 260 and an auto insurance charge of $95 dollars. Now, can I assume that the transportation charge does not include your auto insurance? **A.** No. **Q.** So your transportation charge includes your automobile insurance? **A.** My transportation charges do not include auto insurance. **Q.** Tell me what the $250 includes. **A.** Gas. **Q.** How much of that is gasoline? **A.** I spend about 20 to $30 every 4 days. My job requires me to do site visits. **Q.** And those site visits are within New York? **A.** Within New York. **Q.** Could you take the subway if you had to? **A.** No., I can't take the subway. **Q.** Why is that? **A.** Because it will not be efficient. **Q.** Why is that?

Page 87 - **A.** Because I will be labeled as non productive because certain sites I have visit within a certain period of time. **Q.** Sometimes it's actually better to take the subway in New York as opposes to drive, correct? **A.** It depends on where you are going. **Q.** Exactly. It depends on where you're going. That $260, is that all gasoline? If you took the subway occasionally, would that reduce that amount? **A.** No, it won't reduce the amount. For example, how are you going to take the subway to Maspeth, New York? **Q.** Where? **A.** Maspeth. M-A-S-P-E-T-H. THE COURT: It's in Queens. MS. DENTON: Thank you. **Q.** So you can't take the subway there? **A.** Public transportation goes there but you're going to lose a lot of time.

Page 88, 89 and 90 (lines 2-8) - **Q.** so $260 is all gasoline? **A.** It's gasoline and maintenance like oil changes. There is no repairs at all or anything like that in my schedules. THE COURT: Mr. Opetubo, when you visit these various locations, does your employer reimburse you for any of those gasoline expenses? THE WITNESS: No. You are only allowed to take – at the end of the year you file tax returns and you re able to put down like the mileage you use on the returns. THE COURT: It's 30 or 31 cents per mile or whatever the I.R.S. rate is? THE WITNESS: They are never up. I'm not sure if it's 27 o 37. THE COURT: And that is per mile? THE

WITNESS: Yes, per mile. THE COURT: And it's amount that you take as a deduction from income? THE WITNESS: Yes, the mileage you take as a deduction. BY MS. DENTON: **Q.** I know some New York State employers or city employers give, like, free token packs for the subway. **A.** No. **Q.** You don't have that? **A.** No. **Q.** Are there any perks associated with your employment that we haven't talk about? **A.** Nothing **Q.** You have auto insurance of $95, correct? **A.** Yes.

Page 96 (lines 5-25),– **Q.** Mr. Opetubo, I just want to go your children's' summer camp entry. Now, it shows $250 a month that you pay toward your children's' summer camp, is that just during the summer months? **A.** Yes. **Q.** So June, July, and August you pay $250 a month? **A.** This amount was prorated monthly. **Q.** So 250 times 12 equal $3,000 towards summer camp? **A.** Yes **Q.** Are required to do this under the divorce decree? **A.** Yes. **Q.** Could you show me where/ I didn't see that in there. **A.** Okay. **Q.** It's _ exhibit 11, Mr. Opetubo. **A.** That's right. Do you see item number 2. **Q.** Okay. I'm with you.

Page 97 - **A.** Okay. It starts, husband shall not be responsible for summer camp expenses for the children for 1998 only. **Q.** Okay. And then it says for following summers --. **A.** Husband shall be responsible for a proportionate hare to be determined by the husband's income as compare to the wife's income. **Q.** So is that how you end up with the $250? **A.** It should be more than that. **Q.** How much is the summer camp, do you know? **A.** The last time she sent me a bill for almost $5,000. **Q.** So you're paying more. You're paying 3,000 of that 5,000. is it 5,000 per child? **A.** No, no. That is my share of it. She sends me a bill for $5,000, and my share of it--. **Q.** How much is the summer camp? **A.** I don't know? **Q.** You don't know? A. That's what she gives me. She said your share is $5,000. I said, how did you arrive at this number?

Page 98 (lines 2-13) **Q.** What did she say? **A.** She said that is what I spend because they have to go to A,B,C, or whatever. I said give me the documentation, but she never did. **Q.** Did you ever ask her for it? **A.** Yes, I did. **Q.** Did you ever bring her to court to try and get it from her? **A.** I cannot because she is a law clerk and there

is nothing I can do about that because she always has a way of getting around it.

Pages 16 (lines 14-25), 17 (lines 2-5)– In accordance with the stipulated agreement, page 6 and 7 , and decree attached as Exhibit 11, I have to continue paying child support until the age of 21 of the children. I have two children. I have to pay child support for those two. I also have to pay my share of the children's summer activities, which has been averaging approximately $250 a month since 1991. I'm also responsible for 50 percent of their college education expenses. My first child which is--she 17 now and will be 21 years of age in the next five years, that's the year 2006. By that time I will be 57 years old. God willing. The second child is 13 and will be 21 years of age in 9 years, that is the year 2009. At that time I will be 60 years of age.

Page 37 (lines 7-12) – **Q**. Do you remember when your first was born? **A**. 1984. She is 17 now. **Q**. So she was born in 1984? **A**. Right. **Q**. And your second child was born four years after her? A. '88. She is only 13 now.

Page 107 (lines 12-21) – **Q**. If you add 7 years to your 14-year-old child, she will be 21, correct? **A**. She is 13. **Q**. I thought you testified that she was 14 previously. **A**. No. **Q**. It doesn't make a difference. So eight years, correct? **A**. It's going to be nine years. Until the year 2009.

APPENDIX U

DIVORCE SETTLEMENT AGREEMENT AND DECREE

A. Support and Custody of the Children (Page 6 & 7 of the Divorce Settlement agreement.)

1. The Husband shall pay to the Wife for the support and maintenance of the children, the sum of $173.50 per week per child until the first to occur of the following: the death of the Husband, the death of the wife, the emancipation of each respective child. Emancipation is hereinafter defined as either child reaching the age of 21; the marriage of the child or the child living habitually with a person of the opposite sex in a husband-wife relationship; entry of the child in to active service in the U.S. Military; the child engaging in full-time employment, except that full-time employment during vacation and summer periods and school intercessions and other recesses shall not be deemed emancipation, nor shall work during a period in which the child takes a semester away from school); the child establishes a permanent residence away from that of the Mother. Residence at camp, boarding school, college or travel shall not be deemed a change in the permanent residence of a child sufficient to constitute emancipation. Payments are to be made bi-weekly by check or money order drawn to the wife and forwarded to her place of residence or such other address as she may designate in writing hereafter to the Husband or, at the option of the Wife, such payments may continue to be collected by the Support Collection Unit of the Family Court (the "S.C.U.").

2. In addition to the foregoing, the Husband shall pay half the reasonable education expenses for each child equivalent to standard four-year college or university at a New York State Institution such as C.U.N.Y. or S.U.N.Y. If

a child chooses to attend a non-New York State institution, the Husband's contribution to her educational expenses will not be more than it would have been had she chosen to attend a New York State institution. Husband shall not be responsible for summer camp expenses for the children for 1998 only. For the following summers, until each child is emancipated, Husband shall be responsible for a proportionate share to be determined by the Husband's income as compared to the wife's income.

B. Divorce Decree (Paragraph 5, page 2 -3 of the decree)

ORDERED and ADJUDGED that: (a) the basic child support obligation in this case is $317; (plus if applicable, expenses for child care, health care not covered by insurance, and educational or other extraordinary expenses); and (b) The parties have voluntarily agreed to child support for Adenike Evelyn Opetubo (D.O.B. July 4, 1984) and Bosede Ajibola Opetubo (D.O.B.) 1/3/1988) in the amount of $173.50 per week, such stipulation reciting, in compliance with DRL section 240 (1 – b): The Parties have been advised of the provisions of section 240 (1-b);

The unrepresented party, if any, has received a copy of the child support standard chart promulgated by the commission of Social Services pursuant to Social Services Law section 111-i.

The basic child support obligation as defined in DRL section 240 (1-b) presumptively results in the correct amount of child support to be awarded;

The basic child support obligation in this case is $292 per week (plus, if applicable, expenses for child care, health care not covered by insurance, and educational or other extraordinary expenses) and

(c) the amount of child support agreed to therein conforms to the basic child support obligation; and it is further

ORDERED and ADJUDGED that the child support shall be collected by the Support Collection Unit of the Family Court (or its successor agency), and it is further

ORDERED and ADJUDGED that the property of the parties, marital and separate shall be distributed as provided in the stipulation of the settlement dated December 13, 1999 annexed hereto and it is further

ORDERED and ADJUDGED that the stipulation entered into between the parties on the 13th day of December 1999, a copy of which is attached to and incorporated in this judgment by referenced, shall survive and not be merged in this judgment.

ENTER.

/s/ La Tia W. Martin
J.S.C.
La Tia W. Martin

APPENDIX V

RENEWAL LEASE FORM

Owners and Tenants should read instructions to owner and instructions to tenant on the reverse side before filing or signing this form

This notice for renewal of lease and renewal lease form issued under section 2523.5(a) of the New York Stabilization Code. All copies of this form must be signed below and returned to your landlord within 60 days.

Tenant's Name: Ahmed A. Opetubo Date: April 1, 2001
Address: 398 Lexington Avenue, Apt. 3
Owner's Name: Francis K. Oyenuga
County: Brooklyn, NY 11216
Mailing Address: 2177 Pacific #8
Brooklyn, NY 11233

1. The owner hereby notifies you that your lease will expired on: 07/13/2001

PART A – OFFER TO TENANT TO RENEW

2. You may renew this lease, for one or two years at your option, as follows:
   1 Year $980.50 x 1.04% = $1,019.72
   2 Years $980.50 x 1.06% = $1039.33
3. Security Deposit:
   Current Deposit: $980.50;
   Additional Deposit Required – 1 year lease: $39.22
   Additional Deposit Required – 2 Years lease: $58.83
4. Specify separate charges if applicable: none
5. Lower Rent to be charged, if any: $850.00
6. This renewal lease shall commence on 8/1/2001, which shall not be less than 120 days no more than 150 days from the date of mailing or personal delivery of this Renewal lease

Form. This Renewal Lease shall terminate on 7/31/2002 (1 year lease) or 7/31/2003 (2 years lease).

7. This renewal lease is based on the same terms and conditions as your expiring lease, except that ____ lawful provisions attached and ____ written agreements between owner and tenant have been added. (Indicate in the blank spaces as applicable, the number of additional provisions or written agreements attached).

This form becomes a binding lease renewal when signed by the owner and returned to the tenant. A rider setting forth the rights and obligations of tenants and landlords under the Rent Stabilization Law must be attached to this lease when signed by the owner and returned to the tenant.

PART B – TENANT'S RESPONSE TO OWNER

I (we) the undersigned tenant(s), agree to enter into a **TWO** years renewal lease at a monthly rent of $1,039.33. this renewal lease is based on the same terms and conditions as my (our) expiring lease, and further attached lawful provisions and attached written agreements, if any (see item 7 under **PART A** above).

I (we) will not renew my (our) lease and (we) intend to vacate the apartment on the expiration date of the present lease indicated above.

Date: 5/13/2001 Tenant's Signature(s): /s/ Ahmed A. Opetubo

Date: 6/26/2001 Owner's Signature(s): /s/ Francis K. Oyenuga

APPENDIX W

1. LETTER TO EDUCATIONAL CREDIT MANAGEMENT CORPORATION

July 14, 2000

Educational Credit Management Corporation
101 East Fifth Street, Suite 2400
Saint Paul , MN 55101

Re: Student Loan # 100-64-1767

I do not agree with the balance amount of $40,344.34 stated in your June 15, 2000. I know that I owed money on my Student Loans.

As per our conversation on the phone, you gave me three options for which I have to choose one of the options. I cannot choose any of the options now until you can provide me information as to how loans' balance is $40,344.44. In addition, I will appreciate it very much for you to provide me with the following information:

1. How much I had paid on the loans from 1986 through 1997 (principal and interest)?
2. How much was the remaining balance (principal and interest)?
3. When does the loans become due?
4. How much and when did you purchase the loans?

For your information my loans have been in repayment since January 1986 through 1997 and I have had deferment/forbearance during the periods of repayment. I was unable to continue making payment on the loans in 1997 because I was going through a divorce that bankrupted me. Currently, I am not financially solvent and cannot afford making any payment on the loans. (I know that you

are not interested to entertain the hardship I am going through because you told me so, but I have to tell you because it is part and parcel of my inability to continue paying the loans.)

Thank you

Sincerely
/s/ Ahmed A. Opetubo

2. LETTER TO EDUCATIONAL CREDIT MANAGEMENT CORPORATION

Educational Credit Management Corporation
101 East Fifth St., #2400
Saint Paul, MN 55101
June 15, 2000

AHMED A OPETUBO
398 LEXINGTON AVE
BROOKLYN NY 11216-1291

Any Questions?
1-800-780-7997

RE: Student Loan(s)
SSN/LOANS #: 100641767
BALANCE: $40,344.34

Dear Ahmed A Opetubo:

Your student loan(s) has been assigned to the Educational Credit Management Corporation (ECMC). We have been notified that your bankruptcy case has concluded. Your student loan(s) is in default and you are responsible for payment of the debt. Pursuant to Federal Regulations and the terms of your promissory note, you will be assessed a charge to cover the cost incurred in collecting your

defaulted loans(s). the costs are calculated based on a percentage of your total outstanding principal and interest balance.

You have thirty (30) days to respond to this notice.

FAILURE TO RESPOND may result in the following resources being utilized to recover this debt including, but not limited to:

* Referral to a professional collection agency.
* Contacting your employer to seize a portion of your paycheck through wage garnishment.
* Referral of this debt to the federal government for collection by seizure of any federal income tax refunds due in the future.
* Assignment of this debt to the U.S. Secretary of Education for the filing of a lawsuit against you by the federal government.

EDUCATIONAL CREDIT MANAGEMENT CORPORATION